TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 145.

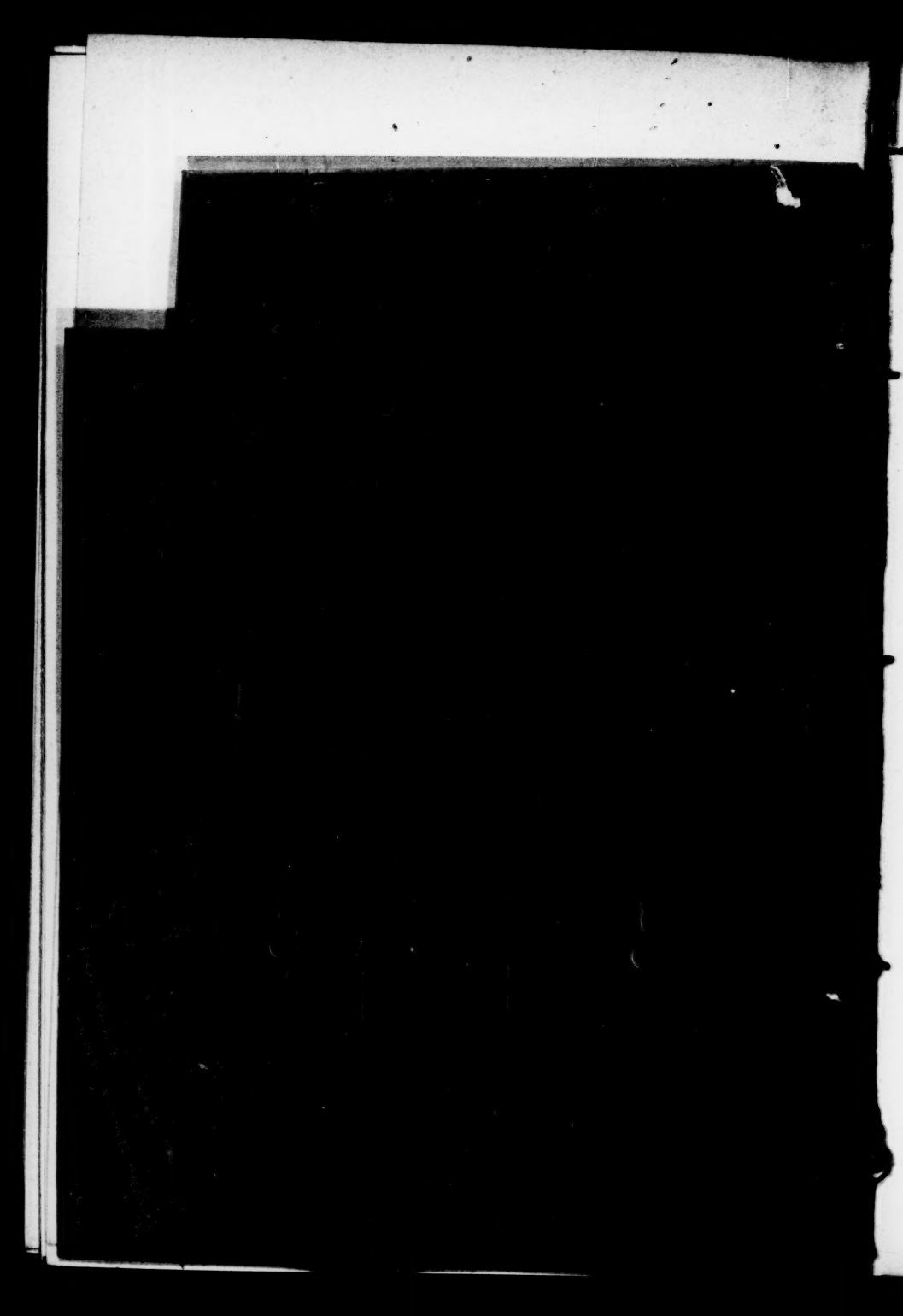
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

SEYMOUR J. McKINLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED SEPTEMBER 8, 1876.



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a Supreme court of Iowa. April term, 1874.

Present, Hons. William E. Miller, chief justice; Chester C. Cole, James G. Day, Joseph M. Beck, judges.

SEYMOUR J. MCKINLEY
vs.
THE CHICAGO AND NORTHWESTERN RAILway Company, app'l't.

Be it remembered that heretofore, to wit, on the 14th day of April, 1874, the appellant's abstract of record in this cause was filed in the office of the clerk of the supreme court of Iowa, in words and figures following, to wit:

1 In the supreme court of Iowa. April term, at Dubuque, 1874.
Appeal from Linn district court.

SEYMOUR J. MCKINLEY, PLAINTIFF,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company, defendant and appellant. } At law.

APPELLANT'S ABSTRACT OF THE RECORD.

E. S. Bailey and N. M. Hubbard, for appellant.
Shiras, Vanduzee and Henderson, for appellee.
On the 2nd day of October, 1872, plaintiff filed in the Linn district court a

Petition,

stating his cause of action, as follows:

Your petitioner, Seymour J. McKinley, a citizen of the State of Iowa, claims of the defendant, the Chicago and Northwestern Railroad
2 Company, a corporation duly organized under the laws of the State of Illinois, and doing business as a common carrier in the States of Illinois and Iowa, the sum of twenty thousand dollars as money justly due plaintiff from defendant.

1. For cause of such claim plaintiff avers that heretofore, during the month of March, 1872, and for a long time prior thereto, the defendant was engaged as a common carrier in the business of transporting freight and passengers for hire over and along the various lines of railroad owned, controlled, and managed by said defendant in the State of Illinois, Wisconsin, and Iowa, and more particularly in transporting passengers from Chicago, Illinois, to Beloit, Wisconsin, over and along the line of railroad passing from Chicago, Illinois, to Harvard Junction in Illinois, and from thence to Beloit, Wisconsin. That on or about the 22nd day of March, 1872, plaintiff purchased of defendant at Chicago, Illinois, a ticket for Beloit, Wisconsin, paying the defendant the usual price therefor, in consideration of which the defendant agreed and became bound to safely convey plaintiff from Chicago, Illinois, to Beloit, Wisconsin, over and along the line of railroad run and managed by defendant between said points or places above named, and to have, furnish, and use proper care for that purpose, with proper persons in charge thereof as conductors, engineers, and brakemen, and by means thereof

to safely transport and convey plaintiff from Chicago, Illinois, to said Beloit, Wisconsin.

That relying upon the duty and obligation of defendant in this respect, plaintiff bought said ticket and got upon the cars of defendant for the purpose of being safely transported and conveyed from Chicago, Illinois, to said Beloit, Wisconsin. That not regarding its duty in that behalf, defendant did not furnish and have proper persons in charge of its cars and trains, nor did defendant safely convey and transport plaintiff from Chicago, Illinois, to Beloit, Wisconsin, but wholly neglected so to do. That when defendant's train from Chicago reached the town of Harvard Junction, in the State of Illinois, plaintiff, by direction of defendant, changed cars and went upon the train going from said Harvard Junction to Beloit, Wisconsin, said train being a train run and managed by defendant, and that being the proper train for plaintiff to go upon in order to continue his journey to Beloit, Wisconsin, the place of his destination and the place to which defendant had agreed to safely convey plaintiff. That plaintiff went upon said train and selected and took possession of a proper seat in a car going to Beloit, aforesaid. That whilst said train was remaining at the depot at said Harvard Junction plaintiff passed out of the said car for a necessary purpose and immediately returned thereto. That the brakeman of defendant in charge of said car, without any just cause therefor, refused to permit plaintiff
3 to enter said car and reoccupy his seat, and upon plaintiff's insisting upon his right so to do, defendant's brakeman, without any reason or justification therefor, assaulted plaintiff, and struck, bruised, and wounded plaintiff, breaking plaintiff's collar bone, fracturing his shoulder, breaking and injuring two or more of plaintiff's ribs, and otherwise greatly injuring, wounding, and bruising plaintiff, in consequence whereof plaintiff has suffered great pain, and is permanently wounded and disabled, both in health and bodily condition, and has been hitherto and is still hindered and prevented from transacting his necessary and lawful business, and has expended and paid out large sums of money, to wit, the sum of $1,000, in and about curing and endeavoring to cure the fractures, wounds, and bruises suffered and received by plaintiff as aforesaid.

That the said brakeman and other servants and employés of defendant did further abuse, insult, and maltreat plaintiff by the use of abusive and threatening epithets and language, continuing the same after plaintiff had taken his seat in said car, and by laying violent hands upon plaintiff's person, and threatening to eject plaintiff from said car, thereby causing great bodily and mental pain and distress to plaintiff. That through the failure on the part of defendants to safely convey and transport plaintiff from Chicago aforesaid to Beloit, Wisconsin, as aforesaid, and through the wilful and malicious wrongs and injuries inflicted upon plaintiff by defendant, its servants and employés as aforesaid, plaintiff has suffered great damage, in the sum of $20,000, for which amount plaintiff prays judgment against defendant with costs.

SHIRAS, VAN DUZEE AND HENDERSON,
Attorneys for Plaintiff.

On the 6th day of November, 1873, defendant filed a demurrer to said petition, which was afterwards withdrawn and leave given to answer.

And on the 6th day of November, 1872, the defendant filed the following motions to suppress depositions:

Motion to suppress depositions of Ellen P. and Friend P. Fletcher.

The defendant moves to exclude the depositions of Ellen P. Fletcher and Friend P. Fletcher, because,

1. The depositions were not read over to the witnesses before signing and swearing to the same.

2. The certificates do not show that either of said witnesses were sworn before giving their testimony.

4 3. The depositions were not returned to the clerk of this court by the notary taking the same, but were returned to P. J. Quigley, clerk of the district court for Dubuque County, and by him opened and filed on the 24th of September, 1872.

4. The certificates do not state whether either or both parties, their attorneys or agents, were present.

N. M. HUBBARD,
Attorney for Defendant.

Motion to suppress deposition of Charles F. Russell.

The defendant moves to suppress the deposition of Charles F. Russell, because the same does not show that it was read over to or by him before he signed and swore to the same.

2. The certificate does not state whether either party, his attorney or agent, was present at the taking of the deposition.

N. M. HUBBARD,
Attorney for Defendant.

And on the 11th day of November, 1872, the defendant filed the following motion to suppress depositions:

Motion to suppress depositions of Hayward & Evans.

The defendant moves to exclude the depositions of Paul D. Hayward and Horace F. Evans, because,

1. The matters testified about are wholly immaterial to the issues in the case, and do not tend in any manner to prove the same, and such testimony is incompetent and irrelevant.

2. The depositions do not show that the same were read over to or by either of the witnesses.

N. M. HUBBARD,
Attorney for Defendant.

On the 20th day of January, 1873, there was sent to the clerk of said court a further and additional certificate, the same to be attached to the depositions of Friend P. and Ellen P. Fletcher, and on the fifth day of March a further and additional certificate to be attached to the depositions of Paul D. Hayward and Horace F. Evans, and on or about the 12th day of February, a further and additional certificate to be attached to the deposition of Charles F. Russell, the same being the certificates of the commissioners respectively who had taken said depositions and made out as required by law, to show that said depositions were properly taken. Said certificates were procured by the plaintiff ex parte and attached to said depositions without any order from court or knowledge of the defendant.

And on the 17th day of March, 1873, on the first day of the March term of said court, on the foregoing motions to suppress depositions, the following

Record entry

was made in said cause:

On this day this cause comes on for hearing on the motions to suppress depositions, and the court being fully advised in the premises, considers that said motions be overruled, to which defendant excepts. Demurrer herein is withdrawn and leave to answer granted. Cause is continued.

And on the 20th day of March, 1873, the defendant filed in said court the following

Answer

to said petition:

1. The defendant in the above cause denies each and every allegation of plaintiff's petition generally and specifically.

2. For further answer and defense defendant says that the defendant's brakeman, one Sweet, without the authority or approval of defendant, inflicted the injuries complained of by plaintiff, if any, wilfully and maliciously, and not in the performance of his duty.

3. For further answer and defense defendant says that plaintiff assaulted the brakeman of defendant, and that, while, and in and about, resisting said assault the plaintiff received the injuries complained of, if at all.

E. S. BAILEY AND N. M. HUBBARD,
Attorneys for Defendant.

And afterwards proceedings were had in said district court as shown by the following

Bill of exceptions,

filed in said court Nov. 10, 1873:

Be it remembered that on the 5th day of November, 1873, this cause came on for trial before the Hon. Jas. H. Rothrock, judge, and a jury.

And thereupon the plaintiff offered and introduced in evidence the following testimony to support the issues on his part:

Deposition of Joseph S. Claus.

My name is Joseph S. Claus, aged 28 years. Am a resident of Frankfort, Will County, Ill's. My occupation is a merchant. I never knew either of the parties named until I became acquainted with Seymour J. McKinley, plaintiff in this action, at the depot of the Chicago and Northwestern Railroad Company, at Chicago, Ill's, March 22, 1872. I saw the plaintiff for the first time at said depot. We both purchased railroad tickets for Beloit, Wisconsin, at 5 o'clock p. m. of that day, and entered the same car, and from that time until 9 o'clock p. m. we
6 both were traveling on said railroad for Beloit. After said plaintiff entered the car he sat down and rode in the same seat with me. Said McKinley then and there told me he was going to Beloit, Wisconsin.

I was at Harvard Junction on said railroad on the 22nd day of March, 1872, in the evening of said day. I was there on my way to Beloit, Wisconsin. I think I rode in the second or hind car from the engine

from Harvard Junction. I sat near the car-door. I first heard and saw S. J. McKinley at the car-door in which I sat. He asked the brakeman on said train to open the door and let him, McKinley, come in, that he had some baggage in said car; to which said brakeman replied that he should not let him (McKinley) into said car. At said time and place aforesaid I saw a difficulty between McKinley and said brakeman aforesaid, when and where said plaintiff came on to the platform of one of the cars and insisted on entering the car in which I sat. Said brakeman refused to let him enter by adding, "By God, you shall not go into said car," to which said plaintiff replied, saying, "My baggage is in this car, and I will go in," and attempted to push his way into said car, whereupon said brakeman struck the plaintiff, McKinley, with his fist and knocked him against the car-door. The plaintiff still forced his way into said car, and was about taking his seat in the car when the brakeman re-entered with another young man, seizing hold of plaintiff by his collar violently, as though he meant to expel him from the car, when the plaintiff said he was sick and did not want anything to do with him, said brakeman, meaning thereby to be understood that said plaintiff was only going to where he had previously left his baggage when he attempted to enter the car where this difficulty occurred. As above stated, said plaintiff rode in the same car and on the same seat with me from Chicago to Harvard Junction, and frequently talked with me face to face, which gave me a good opportunity of knowing his condition, and I am certain and very confident that said plaintiff was in no way or manner intoxicated by strong drink. I was not accompanied by any lady at said time referred to. I entered the car by the front door near by which I sat. There was no objection to my entering the car at said front door by any one at said Harvard Junction. While at Harvard Junction I saw plaintiff take the baggage from the car in which we rode from Chicago and carry it to the car into which he afterwards attempted to enter; and at the time the said plaintiff wanted to enter said car where this difficulty arose said plaintiff's baggage was then and there deposited therein. I cannot state that brakeman positively knew that plaintiff's baggage was in said car, but I heard plaintiff repeatedly tell said brakeman that his baggage was in that car, and he therefore wanted to go in.

Int. 14. If you know of any other matter or thing pertinent to
7 the issues in said cause, and of benefit or interest to the parties to this suit, you will state the same as though thereunto specially interrogated.

Ans. I don't remember anything further of interest to either party further than I can say that when we reached a station after leaving Harvard Junction, I heard said brakeman boast to some one near by that he had punched a certain passenger in my said car while he was back at Harvard Junction.

(The defendants object to the 14th interrogatory and answer thereto on the ground that it is immaterial. The objection sustained by the court.)

Deposition of Ellen P. Fletcher.

My name is Ellen P. Fletcher; age, 38 years. I reside in Minneapolis, Hennepin County, Minnesota. I have no occupation except that of housewife. I have known the plaintiff since last March. I first saw him on the train of cars at Harvard Junction, in the State of Illinois, on or about the 28th day of March, 1872. He was going to Beloit, Wisconsin.

It was in the latter part of March, and I think about the 28th. I was on the train of cars at Harvard Junction, and was going to Minneapolis, Minnesota. I first saw plaintiff standing in the car at Harvard Junction with two valises in his hands. He laid his valises down in the car and remarked he was going to get a drink. He then went out of the car at door nearest the engine, I think, and in a very short time he returned by same door. At the time I first saw him I think myself and husband and daughter, with one or two other persons, whom I did not know, were the only ones present. When plaintiff entered the car the second time the brakeman of the train was standing at the door and said to plaintiff, "You can't go into this car." Plaintiff told him his baggage was there and that he must go in. Brakeman, with several oaths, and in very abusive language, told him he could not go in. Plaintiff attempted to pass in, and a scuffle ensued between plaintiff and brakeman, when plaintiff succeeded in getting into the car. The brakeman followed him to his seat and dared him outside, and said he would knock his head off, and made a great many threats, all of which I can't repeat. His language was very abusive.

Int. 7. State whether or not you witnessed any difficulty between the plaintiff and any other person, and if you answer yes, then state fully all that took place in connection therewith, with whom did plaintiff have said difficulty, and who was present at the time. State fully and minutely all that was said and done by the parties engaged in such difficulty at the time.

8 Ans. The only difficulty was, as I have stated in answer to interrogatory 6th. The plaintiff told the brakeman, when at his seat, that he was sick and did not want any trouble. He said he only went out for a drink of water. The brakeman continued to curse and abuse him. There were several gentlemen present whom I did not know but no other ladies besides myself and little daughter. The brakeman then left the car and soon after returned in company with another man whom I did not know and sat down a few seats back of plaintiff, and they talked in a low voice, the brakeman frequently pointing to plaintiff. The brakeman then left the car, and in a short time returned with the conductor, the latter collecting tickets as he passed through the car. When the conductor came to where plaintiff sat he asked him if he was the man who had trouble with his brakeman. Plaintiff said yes, and commenced to explain to him how it occurred. The conductor did not seem disposed to listen to him. Plaintiff then told the conductor that he had been over that road for the last six or eight years and had never been stopped or had any trouble before. The conductor told him he lied, and that the brakeman was only obeying orders. The conductor said that car was intended for ladies and gentlemen accompanying them, and that had been their rule ever since the war broke out. There were several other gentlemen there without ladies. Plaintiff was the only one who was stopped or molested.

(The defendant objects to the last clause of the answer to the 7th interrogatory because it was after the difficulty and is merely a conversation between the plaintiff and the conductor and is no part of the res gesta and therefore is not admissible. The objection sustained and plaintiff excepts to the ruling.)

Int. 8. What, if anything, was said or done by defendant or its employés to plaintiff at the time when the difficulty occurred?

Ans. I have stated in answer to the above interrogatory the principal part of what was said and done.

(Defendant objects to the 8th interrogatory and the answer thereto,

because it is a conversation between the conductor, brakeman, and the plaintiff after the difficulty was over and the train had started and conductor was taking up the tickets, and it is not shown by any part of the testimony that any further assault or difficulty happened afterwards, and that it is immaterial and incompetent. Objection overruled and defendant excepts.)

Int. 9. How many ladies, if any, and how many gentlemen, if any, were in the car when the difficulty occurred? And what, if anything, was said to them on entering the car?

9 Ans. There were no ladies present except myself and daughter about eleven years old. There were about twelve gentlemen present besides my husband. They were not molested or interrupted when they came into the car. I saw them all enter the car, and there was nothing said to them.

(Defendant objects to interrogatory 9 and the answer thereto, because it is incompetent and immaterial. Objection overruled, and defendant excepts.)

Int. 10. If you have stated that objection was made to plaintiff entering the car in question, then state what those objections were. What reasons were given, if any? Who gave the reasons or made the objections?

Ans. The objections were made by the brakeman, but he did not give any reasons—at least I did not hear any; the only reasons I heard given were by the conductor after the difficulty, who said the brakeman was obeying orders, and that that car was for ladies and for gentlemen accompanying them.

(Defendant objects to interrogatory 10, on the same grounds as interrogatory 9 was objected to. Objection overruled and defendant excepts. Defendant asks to have what the conductor said stricken out as incompetent and immaterial. Court strikes out the last clause of the answer to the 10th interrogatory, what the conductor said. Plaintiff excepts to ruling.)

Int. 11. Do you know whether or not there were any objections made to any of the other passengers entering said car? If yea, tell what was said and to whom.

Ans. There was no objection made to any other passengers entering the car.

(Defendant objects to interrogatory 11 and the answer thereto as being incompetent and immaterial. Objection overruled and defendant excepts.)

Int. 12. What was the manner of the plaintiff and the party with whom he had the difficulty at the time and immediately after the scuffle referred to by you? How did they conduct themselves in their acts and language?

Ans. The plaintiff was quite mild and polite; the brakeman was rude and boisterous [and used a great many oaths and curses].

(Defendant objects to the 12th interrogatory and the answer
10 thereto. Court rules that that portion of the answer to the 12th interrogatory in brackets be stricken out and the remainder allowed. Defendant excepts.)

Int. 13. Where was the conductor of the train at the time referred to, and what, if anything, did he say or do to plaintiff? And state, if you know, who were present at the time.

Ans. The conductor came into the car, as stated above, and said substantially what I have stated in answer to the previous interrogatories.

(Interrogatory 13 stricken out by court. Plaintiff excepts.)

Int. 14. At the time that the difficulty occurred between the plaintiff and the brakeman was there or not any one else near them outside of the car? Who, if any one, was on the platform beside the plaintiff and the brakeman with whom he had the difficulty?

Ans. I do not know; did not see any one else.

Int. 15. State all that was done by the brakeman after plaintiff came into the car; state all that you saw him do and heard him say to plaintiff.

Ans. I have stated in answer to interrogatories 6 and 7 substantially all I remember.

Int. 16. How many, if any, gentlemen unaccompanied by ladies entered the said car? And state what, if anything, was said to them upon entering.

Ans. About twelve gentlemen besides plaintiff came into the car without ladies, and I did not hear anything said to them to the contrary.

(Defendant objects to 16th interrogatory and answer thereto for the same reason as defendant objected to the 9th interrogatory. Objection overruled and defendant excepts.)

Int. 17. State, if you know, what the physical condition of plaintiff was at the time of the difficulty referred to by you?

Ans. I do not know, except that he said he was sick.

(Defendant objects to the 17th interrogatory and answer thereto as being hearsay and is incompetent and immaterial. Objection overruled and defendant excepts.)

I have stated all that I can remember. I have given the substance of all that occurred and the language as near as I can.

11 Cross-interrogation:

I have never had any difficulty or lawsuit with the Chicago and Northwestern Railway Company. At the time of the scuffle between the plaintiff and brakeman at Harvard Junction, Illinois, I was in the car. The door was shut before the scuffle and was opened either at the time or immediately before the scuffle. I did not see or hear all that was said and done on the platform of the car. I saw and heard all that was done inside the car. Did not hear the brakeman tell plaintiff he could not enter the car because it was the ladies' car, and he had orders not to allow gentlemen unaccompanied by ladies to enter that car, or words to that effect. Did not hear the plaintiff immediately tell the brakeman to get away from the door of the car and call him a son of a bitch. I think, on reflection, that plaintiff called the brakeman a son of a bitch when they were inside the car and when plaintiff was seated. Did not see which one clenched first. The conduct of the plaintiff was not violent and angry. The brakeman picked up the plaintiff's hat, which had fallen during the difficulty, and gave it to plaintiff after plaintiff had entered the car. The conduct of the brakeman was very violent, and he seemed to be quite angry. The plaintiff left the train at Beloit, Wis. He took with him two valises of medium size, one a little larger than the other. Could not give the weight, as I do not know the contents of the valises.

STATE OF MINNESOTA,
County of Hennepin, ss:

I, Thomas Lowry, a notary public in and for said county and State, do hereby certify that the above deposition of Ellen P. Fletcher was sworn to and signed by the said deponent, before me and in my presence,

and that the said deposition was taken by me on the 21st day of September, 1872, between the hours of 9 o'clock a. m. and five o'clock p. m. of said day, at the place and for the purposes named in the caption thereof.

Witness my hand and seal, at my office in Minneapolis, in said county and State, this 21st day of September, 1872.

[L. S.] THOMAS LOWRY,
Notary Public, Hennepin County, Minnesota.

(On the back of the foregoing deposition of Ellen P. Fletcher appeared the following indorsement:) Filed Sep. 24, 1872. P. J. Quigley, clerk.

Deposition of Friend P. Fletcher.

Taken on the same interrogatories and cross-interrogatories propounded to Ellen P. Fletcher.

12 My name is Friend P. Fletcher; aged 42 years; occupation, lumberman; reside in Minneapolis, Hennepin County, Minnesota. I have known the plaintiff since the latter part of March, 1872. I first saw him at Harvard Junction, in the State of Illinois. He was going to Beloit, Wisconsin. I was at Harvard Junction, and was going to Minneapolis, Minnesota. I first saw plaintiff getting into a railroad car at Harvard Junction on the defendant's railroad. He was going into the rear car at the front door. He had two valises, and I think an overcoat in his hands. The brakeman was standing on the platform of the car, and plaintiff asked the brakeman if that was the Beloit car. The brakeman said it was, and the plaintiff passed into the car. He (plaintiff) walked about to the center of the car and put his baggage in one of the car seats. He then passed out of the car by the same door he entered.

Ans. to int. 6. I saw plaintiff enter the car twice. The second time he entered the same brakeman was standing on the platform. Plaintiff asked brakeman to please stand aside and let him in the car. The brakeman remarked, "No, by God, you can't go in there." Plaintiff told the brakeman he had been in the car and his baggage was there and he wanted to go in. The brakeman told him it made no difference, that he could not go in there. He started to go into the car and the brakeman pushed him back. They then had a scuffle, during which both plaintiff and the brakeman got inside the car. The brakeman had hold of plaintiff, and plaintiff told him he did not want any fuss, that he was not well and did not wish any trouble. The brakeman called him all kinds of harsh names, and cursed and abused him, saying he would break his head, and he would kick his dammed guts out in a minute, and a great deal more such language of a similar character. The brakeman said, "You must be dammed careful, as I am a bad man to bunt against." About that time plaintiff took his seat, and the brakeman followed him along to his seat, calling him all kinds of harsh names, and said if his conductor told him to do so he would break his dammed neck. The brakeman, after abusing plaintiff for some time, passed out of the car, and in a few moments returned in company with another party whom I did not know. They both sat down behind plaintiff and talked in a low tone, and the brakeman frequently pointed towards plaintiff. I could not hear what was said. My wife and daughter, with several other men whom I did not know, were present, also my nephew. The plaintiff was quite mild and seemed to tremble, and frequently felt his shoulder. He frequently told the brakeman he did not want any difficulty.

(Defendant objects to that portion of the answer to the sixth interrogatory where the two brakemen sat down together. Objection over ruled and defendant excepts.)

13 Ans. to the 7th int. Yes; the plaintiff had a difficulty with the brakeman of the train. I have stated in my answer to interrogatory 6th the particulars of the difficulty, as far as I can remember. I did not know any of the parties present except my wife and daughter and nephew. I think there was about five or six more there when the difficulty began, and about twelve besides myself and nephew when it was all over. My answer to the foregoing interrogatory explains fully the difficulty. The plaintiff called the brakeman a son of a bitch. That was the only rude expression plaintiff used.

Ans. to int. 8. I have stated all that I remember as transpiring between the brakeman and plaintiff. [After a little while the conductor came in with the brakeman, and they talked together a little while, the brakeman in the mean time pointing toward plaintiff. I could not hear what was said. The conductor commenced taking up tickets, and when he came to where plaintiff sat the conductor asked him if he was the man who had the difficulty with his brakeman. Plaintiff replied that he was the man his brakeman stopped. The conductor said he should be careful about getting into a fuss with that brakeman as he was a bad man to have a fuss with. He said his brakeman was acting according to orders, as that no gentlemen who were not accompanied by ladies were allowed in there. Plaintiff said he had traveled over that road for seven or eight years and had never been stopped before. The conductor said that he knew better. He said that gentlemen alone were always excluded from that car.]

(Defendant objects to all the answer to the 8th interrogatory included in brackets. Objection sustained and plaintiff excepts.)

Int. 9. (See int. 9 in Ellen P. Fletcher's deposition above.)

Ans. There were no ladies in the car except my wife and little daughter, eleven years old. There were about fourteen gentlemen, including myself and nephew. The brakeman was on the platform when most of them entered, and he did not stop or interrupt them. He did not say anything to any of them against entering the car. They were not stopped or interrupted by any one. Nothing was said to them on entering the car.

(Defendant objects to the 9th interrogatory and answer thereto on the same grounds as defendant objected to the 9th interrogatory of deposition of M'r's Ellen P. Fletcher. Objection overruled and defendant excepts.)

Ans. to int. 10. No reason was given at the time he was stopped. He was stopped by the brakeman, but he did not tell him the reason he could not go into the car.

14 Ans. to int. 11. There were no objections made to any of the other passengers entering the car.

(Defendant objects to the 11th interrogatory on the same grounds as defendant objected to the 9th interrogatory of deposition of M'r's Ellen P. Fletcher. Objection overruled, and defendant excepts.)

Int. 12. (See interrogatory 12, in Ellen P. Fletcher's deposition.)

Ans. The brakeman was rough, violent, and boisterous in his actions and language. The plaintiff was mild in his language, but seemed quite agitated and seemed to tremble. The plaintiff called the brakeman a son of a bitch.

(Defendant objects to the 12th interrogatory as calling for conclusions

of the witness and not for facts, and it is, therefore, immaterial and incompetent. Objection overruled, and defendant excepts.)

The conductor was not in the car at the time of the difficulty. I have stated before all that took place when the conductor came in the car. I do not know if there was any one outside the cars. There was no one else on the platform but the plaintiff and brakeman at the time of the difficulty.

Int. 16. (See int. 16, in Ellen P. Fletcher's deposition above.)

Ans. There were thirteen gentlemen in the car unaccompanied by ladies. There was nothing said to any of them when they entered the car.

(Defendant objects to the 16th interrogatory as incompetent and immaterial. Objection overruled, and defendant excepts.)

Int. 17. (See interrogatory 17, in Ellen P. Fletcher's deposition above.)

Ans. I do not know. He said he was sick and had been so for nearly a week.

(Defendant objects to the 17th interrogatory on the same grounds as defendant objects to the 16th interrogatory. Objection overruled, and defendant excepts.)

I do not know of anything else of any benefit to either party.

Cross-interrogation:

I have never had any difficulty or lawsuit with the Chicago & Northwestern Railway Company. I was in the car at the time the difficulty occurred. The door was open. I heard all that was said, but think I did not see all that was done. Brakeman did not tell plaintiff he could not enter the car because it was the ladies' car and he had orders not to allow gentleman unaccompanied by ladies to enter that car, or words to that effect. Plaintiff did not immediately tell the brakeman to get away from the car door and call him a son of a bitch. He called him a son of a bitch after they had entered the car and the scuffle was over. Plaintiff attempted to go into the car and the brakeman pushed him back. Plaintiff's conduct was not violent and angry during the whole difficulty. The brakeman picked up the plaintiff's hat, which had fallen during the difficulty, and gave it to plaintiff after plaintiff had entered the car. Brakeman seemed quite angry and very passionate. Plaintiff left the train at Beloit, Wisconsin. He carried two small satchels with him out of the car; also an overcoat. I think he put on his overcoat. Could not give the weight of the valises.

STATE OF MINNESOTA,
County of Hennepin, ss:

I, Thomas Lowry, a notary public in and for said county and State, do hereby certify that the above deposition of Friend P. Fletcher was sworn to and signed by the said deponent before me and in my presence, and that the said deposition was taken by me on the 21st day of September, 1872, between the hours of 9 o'clock a. m. and five o'clock p. m. of said day, at the place and for the purpose named in the caption thereof.

Witness my hand and seal at my office in Minneapolis, in said county and State, this 21st day of September, 1872.

[L. S.] THOMAS LOWRY,
Notary Public, Hennepin County, Minnesota.

(On the back of the foregoing deposition of Friend P. Fletcher appeared the following indorsement:) Filed Sep. 24, 1872. P. J. Quigley, clerk.

Deposition of James C. Truman.

My name is James C. Truman; age, 31 years; residence, Binghamton, Broome County, New York; occupation, that of broker. Have known the C. & N. W. R'y Co., by reputation and by riding over it occasional'y, for the past ten years. Never saw the plaintiff in this action except at the time of the occurrence hereinafter mentioned. I do know about a scuffle or difficulty that occurred at Harvard Junction on Friday evening, March 22, 1872. The train bound for Beloit was standing at the depot at Harvard Junction.

I, with other passengers, had taken a seat in the rear car (I think)
16 of said train. As the train seemed to be waiting for something, I left my valise in the seat and went out on the platform of the depot to walk for exercise.

Captain McKinley, the plaintiff in this action, who had previously taken a seat, I think, two seats in the rear of mine, also came out to walk on the platform, leaving his baggage in his seat. After walking a few minutes I attempted to re-enter the car and was stopped by a brakeman, who said I must go into the next car forward. I did so, and found that car dark and cold, and no other person in it. I then returned and told the brakeman that I should not ride in that car for the reason that it was cold and not lighted, and, furthermore, I had a seat in the rear car, and my baggage was in it. After a little hesitation he stepped to one side, and I entered the rear car, or where my baggage had been left. Soon thereafter I heard loud talking on the front platform of the car where I had entered, between Capt. McKinley, the plaintiff in this action, and said brakeman. The door was pushed open and Capt. McKinley stepped inside the car where I was, the brakeman having hold of him. The brakeman pulled him out on the platform again, where a violent struggle ensued, which lasted some little time. The brakeman seemed to have the advantage of McKinley, and bent the latter over the iron railing of the platform of the car. During the scuffle the hat of plaintiff was lost between the cars. Capt. McKinley finally succeed' in breaking away from the brakeman and re-entering the car. He went back to his seat bareheaded, and was very pale and excited, and could hardly get his breath, and spoke with great difficulty. The brakeman came into the car to where the plaintiff was sitting, shaking his fists in McKinley's face, and told him, McKinley, that he, the brakeman, could whip him with one hand. The brakeman used very insulting and abusive language to him (McKinley). The car door remained open during the scuffle, from the time it was pushed open as above stated. After the scuffle, and the plaintiff had taken his seat, he requested said brakeman to get his hat, which the latter refused to do. Plaintiff entered the car after I did, and only once before the struggle. He had one or more pieces of baggage, which he deposited in his seat or in the rack over it. I heard the plaintiff tell the brakeman before the scuffle that he had a seat in that car, and that he was going in there. I don't know whether that was said just before the door was pushed open, or at that time. There were ladies in that car. I was going from Chicago, Illinois, to Beloit, Wisconsin. I was not accompanied by a lady. I entered the car by the front door thereof, that is, the one nearest the engine. The brakeman was a large and powerful man. His conduct was rough and ungentlemanly toward the plaintiff, and during the struggle his manner was excited and violent. I heard loud and excited talk be-
17 tween the plaintiff and brakeman, but I remember nothing that was said by either of them except as stated above. I was in my

seat at the time, on the left-hand side of the car, as I entered same, and about four or five seats back from the door where the struggle took place. The scuffle occurred after dark. I know of nothing further pertinent to the issues in this suit.

Deposition of Charles F. Russell.

My name is Charles F. Russell, am twenty-four years of age, am a medical student. I know the parties to this suit. Have known plaintiff since sometime in March, 1872. Have known defendant about six years. My occupation on the 22nd of March, 1872, was that of the manager of the Chicago Christian Union.

Int. 4. State fully all you know in relation to the matters in controversy in this suit.

Ans. I had left the train of the defendant at Harvard Junction, Ill., to take supper. After supper I went across the track to the cars to take the train for Beloit, Wisconsin. I got onto the forward platform of the rear car, on which was a brakeman; the same brakeman whom I afterward saw in the struggle with McKinley. He did not oppose my going into the car, and I went in and took a seat in the rear car of the train. I was seated but a short time when I heard a noise on the front platform of the car, and heard some one say, "You can't come in here." Some one replied, "I will, for my baggage is in here, and I will come in here." I then saw the brakeman in the door of the car looking out, and McKinley on the platform trying to push his way in. McKinley said, "I don't want to have any fight, for I am not well, but I can whip a dozen like you."

McKinley pushed his way into the car and pushed the brakeman in ahead of him, using no more violence than was necessary for that purpose. The brakeman struggled with him, and McKinley pushed him onto the floor. He held him there and raised his foot and told him he could kick him, but let go of him and went and took his seat just behind me. Then they had some words, I do not remember what they were. The brakeman went out on the platform.

McKinley then told us that he was sick and not able to have any trouble with any man, but that he had been in the car once that night without opposition, and had left his baggage, and went out to get a drink of water, and that he would come in anyway. McKinley got up and went to the door after talking with us a few moments, and called the brakeman a "son of a bitch." He had not used any language of this sort before in my hearing. The brakeman followed him in again, and they had some more abusive language between them. The brakeman
18 then went out and shortly came in with another man who seemed to be a brakeman. I expected from their actions that they were going to make another attempt to put McKinley out. They did not, however, attempt it. When the conductor came in for our tickets he told McKinley that he could not put the brakeman into the car, and talked to McKinley in a very insulting and abusive manner. McKinley told us the brakeman had hurt his arm. I remember nothing further about the matter at present.

(Defendant objects to that part of the 4th interrogatory and answer, being a conversation between the conductor and McKinley, commencing with the words "When the conductor," and ending with "abusive manner." The objection sustained, and plaintiff excepts.)

I don't remember the date. I was on defendant's cars coming from Chicago to Beloit. I was in the rear car.

Int. 8. Were you or not accompanied by any lady at that time?

(Defendant objects to the 8th interrogatory as incompetent and immaterial. Objection overruled, and defendant excepts.)

Ans. I was not accompanied by any lady at that time.

Int. 10. Did you see a brakeman at or near the car door when you entered? If yea, state who he was, if you can, or describe him, and state whether or not he made any objection to your entering the car, or whether or not any person objected to your entering the car.

(Defendant objects to the 10th interrogatory as incompetent and immaterial. Objection overruled, and defendant excepts.)

Ans. I did see a brakeman on the platform of the car when I entered. He was the same brakeman with whom McKinley had the struggle. He made no objection to my entering the car, and no person objected to my entering the car.

After I entered the car I took a seat near the center of the car on the right-hand side facing the front door. I first saw the plaintiff on the front platform of the car endeavoring to enter the car door, opposed by the brakeman. I saw no one else near them. Don't remember what the brakeman said at the time, but both McKinley and the brakeman kept talking. The brakeman was about medium height and stoutly built. He was very aggressive and rough. Plaintiff did not strike or kick the brakeman, but only pushed him ahead of him into the car. Did not hear the brakeman give plaintiff any reason for objecting to his entering the car. Did not hear him tell plaintiff he was a brakeman.
19 He was the same one who stood in front of the car when I entered. The scuffle occurred at the front door of rear car. After the scuffle another brakeman entered the car with the first brakeman.

Int. 22. How often, if at all, have you traveled over defendant's road between Harvard Junction and Beloit? And state whether you so traveled alone or in company with ladies; and, if alone, state whether or not you were ever stopped from entering the ladies' or rear car of defendant.

(Defendant objects to the 22nd interrogatory as incompetent and immaterial. Objection overruled, and defendant excepts.)

Ans. I have traveled over defendant's road from Harvard Junction to Beloit twenty times or more within the last four years, usually alone. I have never been stopped at Harvard Junction from entering the ladies' or rear car of defendant.

Int. 23. State whether there was anything to indicate that the car in which the difficulty occurred was a ladies' car.

(Defendant objects to the 23rd interrogatory as incompetent and immaterial. Objection overruled, and defendant excepts.)

Ans. There was nothing that I saw to indicate that the car in which the difficulty occurred was a ladies' car.

Think there was one lady and about eight gentlemen in the car. I saw no blows struck by either party.

Cross-interrogation:

During the last ten years I have been a dry-goods clerk, storekeeper for the Chicago Aid and Relief Society, manager of the Chicago Young Men's Christian Union, and am now a medical student. I do not think plaintiff was under the influence of liquor at the time this difficulty occurred. Did not see him drink any intoxicating liquors that day. I do not use intoxicating liquors as a beverage at any time. I cannot state that I heard all that was said and saw all that was done. I did see all that was done and heard all that was said inside the car. I

think the plaintiff told the brakeman to get away from the door at the time of the difficulty, and I heard him call the brakeman a son of a bitch after the scuffle was over. Do not know who began the scuffle. Don't think plaintiff used grossly insulting language except when he called the brakeman a son of a bitch. The brakeman seemed more anxious to prove that he could whip the plaintiff than to prevent him entering the car. Did not hear brakeman tell plaintiff he could not allow him to enter the ladies' car, because he had orders not to
20 allow gentlemen unnacompanied by ladies to do so. Am in no way related to plaintiff. Never had any difficulty or lawsuit with the C. & N. W. R'y Co.

STATE OF WISCONSIN,
Rock County, ss:

I, Alfred Taggart, notary public, do hereby certify that the above deposition of Charles F. Russell was sworn to and signed by the said deponent, before me, and in my presence, and that the said deposition was taken by me on the 14th day of September, 1872, between the hours of eleven o'clock a. m. and four o'clock p. m., at the place and for the purpose named in the caption thereof.

Witness my hand and seal at my office in the city of Beloit, county of Rock and State of Wisconsin, this 14th day of September, A. D. 1872.

[SEAL.] ALFRED TAGGART,
Notary Public for Rock County, Wisconsin.

Deposition of Moses S. Hinman.

My name is Moses S. Hinman; age, 39 years; residence, Beloit, Wis.; occupation, paper dealer. I know both parties to this suit. I saw the plaintiff either Saturday or Monday morning succeeding a difficulty between himself and a brakeman at Harvard Junction.

Int. 4. State what, if anything, you know about plaintiff having received an injury in March last, and when and where you first learned of his injury, if at all.

Ans. I saw him at the time spoken of in my answer to the third interrogatory, and he had evidently received an injury. [I learned of it at that time from plaintiff himself.]

(Defendant objects to the answer to the 4th interrogatory as being hearsay and incompetent. Objection overruled, and defendant excepts. The last clause of said answer (in brackets) not read.)

Int. 5. State whether or not you had any conversation with plaintiff respecting injuries which he claimed to have received in March last in a difficulty with a brakeman at Harvard Junction. If you had any such conversation give the same fully.

(Defendant objects to the 5th interrogatory as being incompetent testimony. Objection sustained, and plaintiff excepts.)

Ans. I had a conversation with him at the time stated before. It was a long conversation and I cannot now remember it all. The substance was that he rode up from Chicago to Harvard Junction in the rear
21 car of the evening train, and had his baggage in the car with him. When this train stopped at Harvard Junction he got out of the car and left his baggage in the car. While he was out of the car, the car was switched off from the rear end of that train and attached to the train that was made up for Madison. After awhile he returned to the car, and when he attempted to re-enter was stopped by the brakeman at the door of the car, on the platform, and that he had an altercation

with the brakeman then and there, during which the brakeman struck him on the shoulder. After some further difficulty, the exact nature of which I do not remember, McKinley effected an entrance into the car and got a seat. He also told me that after he had taken his seat the brakeman returned to him, threatening to remove him from the car, but he did not make any demonstration to do so. That when the conductor came in, he, the conductor, remarked to McKinley that he understood that he had been having trouble with his brakeman. McKinley replied that he had, that the brakeman had undertaken to prevent his getting on the train or into this car, but that he did not succeed. The conductor remarked that he would have succeeded if he had been there, for he should have taken the brakeman's part, but subsequently the conductor came to McKinley and requested him not to say anything about it, as he did not wish to have any trouble reported to the company about his train.

Ans. to int. 6. I did not see plaintiff on the day after this difficulty occurred.

Int. 7. Did you or not see plaintiff on the day after his reported difficulty with a brakeman at Harvard Junction in March last? If yea, state what, if anything, you know concerning his physical condition. Did you or not see his shoulder at that time? If yea, state what its condition was, give its appearance, and state what, if anything, was said by plaintiff, or either of you, at that time, in regard to his shoulder, and give your means of knowledge.

(Defendant objects to the 7th interrogatory as being incompetent testimony. Objection sustained, and plaintiff excepts.)

Ans. I can't tell whether I saw him the next day or Monday morning succeeding the difficulty.

Ans. to int. 8. Did not sleep with plaintiff on the first or second night after said difficulty.

Int. 9. What, if anything, do you know concerning the physical condition of plaintiff in March last? State when you first learned of his condition, what it was, how you learned it, and what conversation, if any, you had with plaintiff respecting injuries received by him in March last at Harvard Junction.

22 (Defendant objects to the 9th interrogatory as being incompetent testimony. Objection sustained, and plaintiff excepts.)

Ans. I know that at the time of the interview I have spoken of before took place, I noticed that he had received injuries and asked him what the matter was. He then told me of the difficulty he had had with a brakeman, as I have before related. I think I asked how bad he was hurt, and he replied that he thought he had received a severe bruise from the blow of the brakeman. I then remarked, "Captain, you are hurt worse than you know or than you think. Your shoulder is broken." I thought so, judging from the appearance of his shoulder as he stood facing me, that shoulder appearing to me to be lower than the other. I first learned of his condition at the time of this interview. I learned it by observation. The conversation that took place at that interview I have related in my answer to int. 5.

Int. 10. If you know of any other matter or thing pertinent to the issues in said cause, and of benefit or interest to either of the parties, state the same as fully as though you were thereunto specially interrogated.

Ans. After I had told him that I thought his shoulder was broken, I advised him to go immediately and consult a physician. I know that during the year, between the date of his injury and this date, he has been

unable to use his left arm. I have frequently assisted him in putting on his overcoat, he being unable to do so without assistance. I have repeatedly ridden with him in his carriage, and noticed that he always drove his horse with one hand, with his right hand.

(Defendant objects to the answer to the 10th interrogatory as being incompetent and immaterial, and the statement of the plaintiff himself. Objection overruled, and defendant excepts.)

Deposition of William A. Brainard.

My name is William A. Brainard; age, 24 years; residence, Beloit, Wis.; occupation, farmer. I know the plaintiff to this suit, and the defendant simply as the Chicago & Northwestern Railway Co. I saw plaintiff on the evening of the same day that a difficulty occurred between him and a brakeman at Harvard Junction.

Int. 4. State what, if anything, you know about plaintiff having received an injury in March last, and when and how you first learned of his injury, if at all.

Ans. I went down to the depot for him that evening with a buggy and drove up as near the train as I could, and he came out to-
23 wards me from the train, and I asked him if he had seen me before, and he said he had not till he got pretty near to me. He had his satchels in his right hand; I took them out of his hand and put them into the buggy in front of the seat. He got in with me and we rode up home. After we got there he was going to help me put out the horse. He appeared to be very tired, and I told him to go in and I would put out the horse, and asked him if I should bring in his satchels. He said he did not care. He did not receive an injury at that time. I learned it that same evening from him.

(Defendant objects to the answer to the 4th interrogatory, except as to the last two sentences, because it is immaterial, and objects to the last two sentences because it is hearsay, and the statement of the plaintiff himself. Objection sustained, and plaintiff excepts.)

Int. 5th. (Objected to and stricken out.)

Int. 6th. State, if you know, what was the condition of plaintiff on the day after his difficulty with a brakeman at Harvard Junction, in March last.

Ans. The next day McKinley's shoulder was sore, and he could not get his coat on or off alone. He had to have help about it. He was complaining all day of his shoulder hurting him.

(Defendant objects to the 6th interrogatory and answer thereto, because complaints were not made to any attending physician, and if permitted would allow plaintiff to manufacture testimony for himself, and because, also, it is incompetent and immaterial. Objection overruled, and defendant excepts.)

Int. 7. (Objected to and stricken out.)

Int. 8. Did you or not sleep with the plaintiff on the first or second night after his difficulty with a brakeman at Harvard Junction, in March last? If yea, state how soon after the difficulty, where it was, how the plaintiff slept or rested. State fully what you know about his physical condition at that time.

Ans. I did sleep with the plaintiff the first and second nights after the difficulty, and for several nights thereafter. It was at my father's house in the city of Beloit. Plaintiff was uneasy, and going to bed his shoulder would pain him. He would wake me during the night with tossing. He slept and rested poorly. He was in a good deal of pain

and not able to do anything. He could hardly lift his arm or move it. He had to be helped on and off with his coat for a long time after it. He was not able to hitch up his horse, and I hitched him up for him a score of times or more.

24 (Defendant objects to the 8th interrogatory and answer theref to, because it gives hearsay and not facts within the knowledge o, the witness, and because it purports to give the complaint of plaintiff and is, therefore, hearsay, and is immaterial and incompetent. Objection overruled, and defendant excepts.)

Int. 9. (Objected to and stricken out.)

Int. 10. If you know of any other matter or thing pertinent to the issues in said cause, and of benefit or interest to either of the parties, state the same as fully as though you were thereunto specially interrogated.

Ans. I know he did not work for a long time after it. He finally went to a doctor and had an examination of his arm. It kept getting worse and stiffer. It troubles him still, the same arm and the same place. I know that he can't lift any weight of importance, or have any strain come on his arm.

(Defendant objects to the 10th interrogatory and answer thereto, because it states conclusions which the witness could not know; because it is not responsive to the question; because it gives the opinion of the witness only, and because the question itself is incompetent to sustain any answer touching the issues in the case, and the conclusions given by the witness could not have been learned except from the plaintiff himself, and therefore it is testimony manufactured by the plaintiff. Objection overruled, and defendant excepts.)

Testimony of Seymour J. McKin'ey.

I am plaintiff in this action. Reside in Mitchell County, Iowa. Was traveling for the Rock River Paper Mill Company, in March, 1872. Said company had their headquarters in Chicago, Illinois, and did business in Beloit, Wisconsin, and Marshall, Michigan. On the 22nd day of March, 1872, I bought a ticket over the defendant's road at the Kinzey street depot in Chicago, and paid the usual price for it. Was on my way to Beloit, Wisconsin. I think the train left Kinsey street depot at 7 o'clock in the evening. We changed cars at Harvard Junction. Just before we arrived at Harvard Junction, a brakeman came into the car and hallooed out "Harvard Junction, 20 minutes for supper, change cars for Beloit." When we arrived at Harvard Junction I took my satchels, two small, common sized satchels, and went over to the nearest car on the south of the station. I got up on the front platform of the second car from the rear, but as there was no light in that car I got down and walked alongside the car to the rear end of the car and went upon the rear platform of

25 the same car. There was a man standing upon the front platform of the rear car, and I asked him if that was the Beloit car, and he said it was. He opened the door and I stepped on the platform and passed into the car. I went in to a seat and put down my satchels. One was a ten-inch satchel containing my comb and brush and other light toilet articles, and the other was a sixteen by ten-inch satchel in which I carried my clothes. I placed them in the car and took off my overcoat, which was a cape overcoat without sleeves, and sat down. I got up in a couple of minutes and looked for a drink of water. I could find no water in the car, and I went out and up to

the next car, but seeing no light in there, I then went into the depot for water, but there was no water there. I was not gone more than three minutes, and went back to the car, and stepping on the rear end of the second car I spoke to the brakeman, who was on the front platform of the rear car, and asked him to please to open the door and let me go in, and stepped from the rear platform of the front car to the front platform of the rear car. The brakeman was standing a little in front of the door, his right hand on the handle of the door. He said I could not go in there. I told him my baggage was in there and I wanted to go in. He said "By God," I could not go in there. As he said that he stepped a little to one side, and I, supposing that he intended to let me go in the car, put up my left hand to open the door. The door had swung to but was a very little open. As I put up my hand he struck me on the shoulder. I had advanced my left hand a little, and as he struck me, my body being extended, we both fell into the car. When he struck me my left shoulder was right against the side of the door jamb, and seeing I was going to fall I threw my right arm over him, but he struck with such force that we both fell in the car together and fell partly down. I got up and he gathered himself and caught me by the collar and pushed me between the side of the car and the first seat, with my back to the side of the car. Then he struck me in the left chest with his fist or with whatever he had. He had something in his hand or on his hand; what it was I can't say. I grabbed him then by the collar and jerked him, and he being so far off his balance fell on the floor. I said I had a "good notion to kick him," and then I took my seat. He come to me and took hold of my coat collar and said he would take me out of the cars "dead or alive"; then he let go of me and went out of the car. He was gone several minutes, and returned with another man. They took a seat and talked, and then the brakeman got up and went out. I went to the door to look for my hat. Both the brakemen went out. I saw no one but the brakemen either time I went out. When I went for my hat one of them asked me if I wanted my hat, and one of them said, "You God-damned fool, if you will come out here I will whip you to death." I said, "You son of a bitch, you attend to your business and I will attend to mine." I then passed to my seat.

26 When the conductor came around the brakeman was following him, and I had a discussion with them concerning this fracas.

Ques. State what was said and done during that conversation between yourself, the conductor, and brakeman.

(Objected to because it was after the brakeman had been out and come back again, and is therefore immaterial and incompetent. Objection overruled, and defendant excepts.)

The conductor took up the tickets until he came to me. I handed him my ticket and he asked me if I was the man that had had the trouble with the brakeman. I told him I was. He said if he had been there I would not have got in the car. I asked him why he treated me that way. I told him that I had ridden on that road for from 5 to 7 years and never had any objections raised to my riding on that car. He said that was a "damned lie." Then the brakeman came around and put his hand on my shoulder and said, "If the conductor says so, I'll put you out of the car now, dead or alive," and said he would "kick my damned guts out." Before the conductor left there I told him that "if I could not get justice there, I could get it elsewhere." He went off and came back again and said, "From what I can understand of this case, I think you are both to blame for it, and I hope that there will be no report made of it." I said nothing more to him. I had no further molestation

on my way to Beloit. This was about 25 or 28 miles from Beloit. I did not hear the conductor say anything to the brakeman when he said he would take me out of the car dead or alive. I had on at that time a blue broadcloth suit with a linen shirt and a knit undershirt. I was hurt on my shoulder and in my chest. He struck me twice. I was standing facing to the south. When he let go of the door he stepped back, and no more words were said until I pushed the door open, when he struck me. I have lost apparently the use of my arm. I have not lifted 3 pounds with it since; have been so that I could not dress myself without assistance. I experience pain now in my shoulder and in my chest. I was for months unable to dress myself. The effect of the blow upon my breast was that I bled at my lungs. Air escaped from there to my chest so that it was all puffed up. A place would puff up there at times as big as my fist, and it has been so that I could not wear a coat or vest on it. I have suffered ever since. If I tried to sleep on that side I could not sleep at all. My arm is paralyzed, and quite cold and clammy. I was able to do the business that I was employed to do; was not able to continue it without inconvenience since as before that time. For many months I did not do anything, and what time I have been able to do my business have not been in accordance
27 with my wish, for I had to be very careful and take it very leisurely; can't raise my arm. There is no strength in it. My shoulder is always stiff; more so at times than at others. I never put on a coat without feeling an unpleasant sensation in my chest. Doctor Johnson, of Beloit, attended me and has treated me ever since the occurrence; do not know the amount of my doctor's bills. It has cost a great deal; have paid as I got money along. D'r Case, of Beloit, also treated me, and D'r Taggart, formerly of Rockford, Ill., who, I understand, is not now living. My general health has been poor since the occurrence; didn't do any work last winter from October, when I had a severe hemorrhage, until April. I did everything the doctors advised. I went out to the mountains. This summer and last spring I went to Mackinaw as they advised; never had any difficulty with my lungs before, except when I was a boy I had a fever once. I prided myself on my lungs; was in the Army. My trip to the mountains cost me $390.40, and my trip to Mackinaw $131.45.

Cross-examination:

I am selling goods for the Rock River Paper Company when I do anything. I worked for the same company before the accident. Had been at work for them, I think, going on two years. They were manufacturing building paper for sheathing and lining houses. I was traveling and selling for them. Did some of their collecting also. I traveled in Iowa, Illinois, Wisconsin, Kansas, Nebraska, Wyoming, Canada, and Michigan. My direct salary was about $1,500 a year, and my traveling expenses. I lost a great deal of time for the next two or three months after this injury. At the time I was hurt I was paid by the year, and drew my salary whenever I wanted it on account. Cannot say how much I drew for the year beginning April, 1872, and ending April, 1873. When I went to the mountains I did a little collecting for the company in Denver. I paid my own expenses that trip. Do not know whether I was drawing salary from the company then or not. Have never been notified by my employers that my salary would be reduced or raised. Have drawn money since I was hurt, and there have been no different arrangements made in regard to my salary. I carry samples for them sometimes in my side coat pocket. Was not on company's business in Colorado. Charged

my expenses to myself. Don't remember whether I got the money from the company or not. Expected to get about $65.00 or $70.00 of it back. Have never talked with the company about it since. Have been in Wyoming for the company. When I went to the mountains I was in Denver and Colorado Springs; was gone about two months; last year was gone about 28 days. I keep an account of my expenses for the company and what for myself. The company pays my regular bills
28 and my incidentals I charge to myself. Don't make returns after every trip. Have just got back from the mountains. Don't know whether I have returned to the company what I spent for them or not. Don't know what portion I did charge to them. During the months of May and June I was up on the strait of Mackinaw, at Mackinaw Spring and Alpina, Michigan. I sold a car-load of paper at Alpina. I believe I kept an account of my expenses then. What I charged to myself was $131.45, what I charged to the company I have not with me. Was not doing much of anything in July and August, 1872, nor in April, May, and June, 1872; went to my home in Northern Iowa. Was not attending to my usual business, and do not know whether I received my usual salary or not, as there has never been an understanding about it. May have been about the office a little in August. Didn't have anything to do at the office. Was taken sick in October; had hemorrhage of the lungs and was not able to do any business until next April. I know it was the left lung so far, that it has troubled me and been very painful, while the right one has not. D'r Johnson, of Beloit, has treated me since I was hurt. Did not take one order from October to April and collected but one bill, I think. Do not know how much money I drew on account of my salary last year. I keep an account but haven't it with me. I came out of the Army some time in April, 1865, I think. Did not go to work for the paper company till between three or four years afterwards. A part of that time I did nothing, and then I went into a small store and sold dry goods and groceries. My health was very good. I was wounded in the Army, and my general health was such that I could do no heavy work. I have drawn a pension since the war for ⅔ disability. For a while it was $10 per month, now it is $20 per month. It has been $20 per month since April, 1867, or 1868. Boarded with M'r's Carr three or four days at a time for perhaps three months in 1869. Lungs were very good at that time. Don't remember complaining of them in the presence of M'r's Carr. When I had the attack of hemorrhage in October I was on the cars between Rock Island and Chicago, about 26 days after I had left home. Was traveling for the company. That hemorrhage lasted about half a month; spit blood more or less all the time. Had another attack in November, and right along till May of this year. They commenced in March, after I was hurt. I spit blood the next morning. Don't know how much blood I raised; sometimes more and sometimes less; at no time less than a gill, I think. Can't give the character of the blood, only that it was red. Sometimes clotted. Did not keep any account of the number of days I was not occupied in my usual business from the time of my injury. M'r Judd M. Cobb is the vice-president of the Paper Company, and one of the managing men. I was really em-
29 ployed by M'r Hale, secretary and treasurer of the company. My last hemorrhage was some time in May last.

I came back from my tour out west in September, and since then have been in Chicago part of the time attending the Exposition. Did not exhibit any paper there. Was in the employ of the company. Can't stand anything since my injury. My business does not require severe labor. I have been in the habit of riding from Chicago to Beloit occa-

sionally for years. They usually sent a Beloit car on the hind end of the train at Chicago for the passengers to Beloit, and this car was switched off at Harvard Junction, so that the passengers did not have to change cars. I do not know whether this car was on that day or not. At Harvard Junction this train had on, I suppose, two passenger cars; they had on a baggage car. I did not go into the car next to the rear car. There was no light there. It was after dark but not a very dark night. When I first went in the brakeman was standing on the forward platform of the rear car, very near the door. M'r Cleveland, of Chicago, went in the car with me. I asked the brakeman if that was the Beloit car and he said it was. M'r's Ellen P. Fletcher followed me in. When I went out I remained but a very few minutes. M'r Cleveland went out with me. The depot was about 30 feet from the train. Did not walk up and down the platform with M'r Truman for exercise. Staid in the depot just long enough to see that there was no water there. Never saw M'r Truman before that night. Had no talk with him. Think I was carrying my overcoat on my arm; will not be positive. Did not have my valises with me when I came in the second time. Brakeman was standing nearly in front of the door and a little to one side, facing me. Just as I stepped up he opened the door a little ways. Did not see anybody but the brakeman. When he opened the door he stood still on the side of the platform, and I said "Please open the door and let me go in," and he said "No, by God, I will not." He did not tell me to "Please take the forward car." I told him I wanted to go in, as my baggage was there; he said he "Didn't care a damn," I was not going in there. I did not push him in the car. He stepped a little to one side and I started to go in. He did not say anything more; when I put up my left hand to push open the door, he struck. His back was then to the east and my face to the east. He stepped back perhaps 3 or 4 feet, far enough to give his full force when he struck. He put himself in an attitude. I did not see him when about to strike. He struck so quick that I did not know it. He struck me on the shoulder right about on the collar bone with his fist. There was some bone broken. As I stepped on to the platform of the rear car, I partly turned round and was facing the brakeman. The brakeman had hold of the door. It was about six or eight inches ajar. When he struck me I had my hand on the door, and had shoved it partly open. Had just stepped my foot forward and my back and side was really against the side of the door-casing. The car was lighted. I did not get flat down on the floor. Do not know whether there was a water-closet in that end of *of* the car. There was a stove on the left as you went in. Did not go against it. When he struck me my left arm dropped. I threw my right arm over him, for he struck me with such force that he could not recover himself, and we both went down into the car-door together. I think I was rather on top of him. Did not touch any of my joints to the floor. He got up and caught me by the throat and jerked me. That was right in front of the stove. He shoved me against the side of the car and struck me, and then I caught hold of him and jerked him, and that is the time he fell and I said I could kick him. He fell on his side and I raised my foot over his face. Don't remember the exact language I used. Don't think we got out on the platform to scuffle after getting into the car. Am positive we did not. M'r Russell was in the car at that time and I think M'r Truman and M'r and M'r's Fletcher. I was standing between the stove and the first seat when he struck me, and must have been standing nearly at my full height. Think I did not fall against the stove and injure my shoulder. It was a large cast-iron

stove. There was a contusion where he struck me on the chest. My lung was badly swollen. Don't think I drove my horses the next day. I consulted D'r Johnson, of Beloit, on Monday. On Tuesday or Wednesday following I was examined by another physician. I reported at the office on the Saturday following the accident. I carried my arm in a sling.

Redirect examination:

Came out of the Army in 1865; went into the service in May, 1861. I receive a pension from the United States for wounds received in the service. My principal wounds and the ones I was mustered out on were about the head, jaw, and thigh. Did not receive any wounds about the lungs or chest. I have been retained by the Rock River Paper Company, and have drawn money from time to time. They never called on me for a settlement, and I never sought one. When out to Denver I charged the expenses connected with their business to them. My arm dropped the moment he struck me and I have not raised it since.

Deposition of Paul D. Hayward.

My name is Paul D. Hayward; age 23 years; residence Chicago, Ill.; am a book-keeper. Have known plaintiff for two years, and have known the defendant for the past eight years. I think I know the custom of defendant in regard to permitting or not permitting gentlemen unaccompanied by ladies to ride in the rear or ladies' car. It is the custom to allow gentlemen unaccompanied by ladies to ride in the rear or ladies' car between Harvard Junction and Beloit; they
31 sometimes object, but generally let them pass. I have ridden on the road quite often during the past three years and have never had any trouble in riding in the rear car. I never knew of any objection being made to gentlemen unaccompanied by ladies entering the rear car on defendants' railroad between Harvard Junction and Beloit; sometimes objections were made between Chicago and Harvard Junction. I know of the custom having existed during the past three years. I am acquainted with defendant's road between Beloit and Harvard Junction, and with the style of trains run thereon, and so far as my knowledge extends it has been usual and customary for gents unaccompanied with ladies to ride on any and all cars running on said road. I have frequently seen gents unaccompanied by ladies riding in the rear or so called ladies' car. My means of knowledge are personal observation in passing over the road. During the past two years I have ridden over the defendant's road between Harvard Junction and Beloit, unaccompanied by ladies and in the rear or ladies' car, as often as two or three times a month. I always ride in the rear or ladies' car.

(Defendant objects to the foregoing deposition for the reason that it is incompetent and immaterial, and not tending to prove any of the issues in the case. Objection overruled and defendant excepts.)

STATE OF ILLINOIS,
Cook County, ss:

I, John Summerfield, a notary public in and for the city of Chicago, in said county and State, do hereby certify that the above deposition of Paul D. Hayward was sworn to and signed by the said deponent before me and in my presence; and that the said deposition was taken by me on the 8th day of November, A. D. 1872, between the hours of 11 and 12 o'clock a. m., at the place and for the purpose named in the caption thereof.

Witness my hand and notarial seal at my office in Chicago, Illinois, this 8th day of November, A. D. 1872.

[L. S.] JOHN SUMMERFIELD,
Notary Public.

Deposition of Horace F. Evans.

My name is Horace F. Evans, age, 50 years, residence Chicago, Ill., am treasurer of the Rock River Paper Company. Have known M'r McKinley for two years and the defendant for six years. I think it is the custom to permit gentlemen unaccompanied by ladies to ride in the rear car on defendant's road between Harvard Junction and Beloit, from the fact that they have never objected to my riding there, and I
32 have seen a dozen gentlemen in the rear or ladies' car while there were but two or three ladies. I only know since I have been riding over the road, six years. I am acquainted with defendant's road between Beloit and Harvard Junction, and with the style of trains run thereon, and I think it has been usual and customary for gents unaccompanied with ladies to ride on any and all the cars running on said road, and I have frequently seen gents unaccompanied by ladies riding in the rear or so called ladies' car. My means of knowledge are from frequently traveling over the road, and I have ridden over defendant's road between Harvard Junction and Beloit, unaccompanied by ladies, in the rear or ladies' car, from once a week to once a month, during the last two years' and occasionally before that.

(Defendant objects to the foregoing deposition for the reason that it is incompetent and immaterial, and not tending to prove any of the issues in the case. Objection overruled and defendant excepts.)

STATE OF ILLINOIS,
County of Cook, ss:

I, John Summerfield, a notary public in and for the city of Chicago, in said county and State, do hereby certify that the above deposition of Horace F. Evans was sworn to and signed by the said deponent before me and in my presence: and that the said depo sition was taken by me on the 8th day of November, A. D. 1872, between the hours of 11 o'clock a. m. and 1 o'clock p. m, at the place and for the purpose named in the caption thereof.

Witness my hand and notarial seal this 8th day of November, A. D. 1872.

[L. S.] JOHN SUMMERFIELD,
Notary Public.

Testimony of D'r H. B. Johnson.

My name is Henry B. Johnson. I live in Beloit, Wisconsin. Am a physician and surgeon. Have been in the practice 20 years last March. Was in the Army as Army surgeon a little over two years, I guess. I attended M'r McKinley in March, 1872, for an injury received on his person. I first saw him after the injury, and examined him at my office on Monday, the 25th day of March, 1872. I examined him and simply told him that he had a fracture of his collar-bone, and as it was necessary to have him strip the upper part of his body to dress it, that he must go home and have the dressing put on there. I think it was about dinner time. After dinner I went up there and found there was

still more injury than I had supposed. The whole front part of the chest was bruised and badly discolored; the blood had settled on
33 the front and left part of the chest, and air also was present in the tissue, and there was a puffy condition of the chest. The chest was sore and he complained of difficulty and pain in moving his left arm, and he looked as though it hurt him.

I dressed the wound partially, and put on part of the dressing next day. I think the soreness across the chest was so great that I put on very little that day. I put on what is called Fox's dressing, with a very simple modification. I discovered a fracture of the coracoid process of the scapular that is directly below the collar-bone on the same side—left side. It was difficult to make out the character of the injury and to locate it, on account of the great soreness over the chest and the swelling. There was soreness around the sternum or breast-bone. It was very tender over the whole chest. I told the captain that the probability was the ribs were fractured, but it was difficult to tell the precise point. There was no other way of accounting for the air on the outside of the chest other than that the ribs were fractured and the sharp points had punctured the lungs, and allowing the air to escape into the tissues, giving it the puffy look which extended up to the collar-bone. There was another reason to suppose the captain was injured in the chest. He was spitting blood. Coming back to the collar-bone and bones connected with that process, the effect of the injury was that it produced a paralyzed condition of the arm. His whole arm and hand was swollen, and looked purple, and was colder—much more so—than the other, and there was a sore condition of the shoulder joint. I have continued to treat M'r McKinsley professionally since that time, at intervals. Part of the injurious results still remain. There is a partial paralysis of the arm. There has not been good circulation a good deal of the time. His arm and hand have been quite purple—almost livid. There has always been a difficulty in moving the shoulder joint, and soreness continuing up to the present time. There was for a long time after the injury a good deal of heat and tenderness of the whole shoulder-joint; that is, the circle back as well as in front, the immediate seat of the injury. It is very difficult to state how permanent the injuries will be for several reasons. The question was discussed somewhat among medical men as to the fracture of the coracoid process extending into the glenoid cavity. There is no way of determining that question, except by a post mortem examination, which we have had no chance to make. The shoulder-joint had a great deal of inflammation, continuing for a long time, and if the injury extended to the glenoid cavity the authorities agree there is no recovery from it. The pressure upon the nerves that produce this paralysis and how much of it may be permanent, I cannot decide. It is a very serious injury, and probably will not be recovered from, because the collar-bone is not in its precise place. It is possible that he may recover, but not probable. I do not think his arm has been in a condition since the injury that he could use it at
34 all. I have not seen the captain for some time, but during the time that I was attending him his arm was in no condition to use, either from the shoulder-joint or in any way. The fracture of the coracoid process will probably injure the attachment of one of the muscles of the arm during life. During two or three weeks after he was injured my treatment was simply to keep a gentle pressure over the ribs and apply the dressing. The air passed away, and there was evidence then that the third and fourth ribs were broken. I had not discovered crepitus. So long a time having elapsed since the injury to the

ribs occurred, I thought there was a partial union of the ribs, but still, as there was air passing out from that puncture for a number of months afterwards, the union could have been only partial. I think there was air coming out at times for 9 or 10 months. Since that time he has had chronic inflammation of the lungs. I think the hemorrhage had occurred at intervals, not very large, during the latter part of that spring. There was only one time that it was considerable during that spring. He had severe hemorrhage a year ago the latter part of the fall, I think a little earlier than this. I think some time in October. He was raising a good deal of blood, and had evidence of chronic inflammation of the lungs during the next two or three months. I have no question that the hemorrhage of the lungs occurred from the injuries he received at that time—from the fracture of the ribs and their puncturing the lungs. They must have been injured. The hemorrhage that he had the fall afterwards was from the same cause, and from the chronic pneumonia. If the lung is healthy, the air will not come out that way; it is regarded by the authorities as evidence that there is injury to the lungs. When I first saw him he was very weak and feeble, and confined to a recumbent position; perhaps not in bed all the time, but a portion of the day was out in the sitting-room. For two months, I think, he was not able to be up at all, or about that length of time. There was general health a good deal impaired, tongue furred, loss of appetite, had a constant fever during a portion of this time, lasting a number of weeks, had soreness of the throat at the same time. He had inflammation of throat, peculiarly of that character frequently found where there is a good deal of debility. Chronic inflammation is one of the most serious difficulties to the lungs. It may be recovered from, but very frequently leads to more serious trouble, degeneration, and fatal termination. According to the authorities, it is apt to occur after such injury to the ribs. M'r Hamilton says death very frequently follows from fracture of the ribs, followed by inflammation of the lungs. This deleterious effect is more rapid to some persons than to others. They may live for some time, but their life is shortened by it. It greatly reduced and weakened M'r McKinley. After the first spring, after the warm weather had commenced and the bone united from the fracture, except that of the ribs, captain was about and seemed to be feeling pretty well. There was a difficulty of moving and pain from much motion. There was that escaping of air which produced the puffy appearance until that time. During the hot weather that season, he had some symptoms of inflammation, lasting only during hot weather, but were so much less that he was not inconvenienced by it. He had considerable cough and considerable expectoration with it, and in that condition he could not do much labor. With the approach of fall the pulmonary trouble came on, and he was not relieved until warm weather next spring. He was out during the spring part of the time. It is hard to say what effect it will have upon his capability for labor in the future. He is better this summer than he was last, but he is already showing the effect of cold weather. So long as that difficulty exists in his lungs, his whole physical system will show it. There is an improvement in the captain in another respect. I have used a compress upon that fractured rib, and I think he has succeeded in effecting a union. There has been no escape of air for some time.

Cross-examination:

There was a fracture of the coracoid process of the left shoulder blade. (A skeleton is produced and the coracoid process pointed out by the

witness.) In my opinion there was a fracture of the coracoid process extending into the glenoid cavity. With the arm at right angles to the body and extended out, it is possible to fracture the coracoid process without dislocating the head of the humerus. In such a position the head of the humerus would be about three-fourth' of an inch from the point of the coracoid process. I mean from the humerus proper, the bone itself. The ligament is attached to the process itself. They surround the bone and are very near it. This ligament is capable of resisting a great deal, still it is ruptured sometimes. I think the bone of the humerus is about on a line with the point of the coracoid process when the arm is extended about at a right angle to the body and raised up. With the greatest extension it is about on a line with the greatest prominences of the bones of the humerus. I very much question whether with the arm extended at right angles the coracoid process can be fractured by a blow from the fist of a person.

Ques. Suppose when the blow was struck the person fell inside the car, would that indicate that the shoulder was stationary or whether it was in the position for the scapula to give way?

Ans. Standing without support the scapula would yield, but even if there was no support there would be no difficulty in the fracture of that bone.

36 The fracture of the glenoid cavity is very rare. D'r Hamilton speaks of 9 or 10. I do not know of a fracture of the coracoid process by a blow of the fist, but such a thing has been known in surgery as a fracture of this process without such a blow as is known in surgery as a "crushing blow." I could not say whether this coracoid process was broken at the base, whether it was broken into the glenoid cavity, from any symptoms I was able to get, on account of the swollen condition of the parts and tenderness of the cavity. The coracoid process remained nearly in its normal condition. I have taken evidence sufficient to satisfy me that the fracture was to the coracoid process, but not that it extended into the glenoid cavity. The collar bone was broken about an inch from the outer, the scapular end. It was a complete fracture. I could not tell whether it was oblique, as it was two or three days after the injury before I saw it. It was very tender then and there was a good deal of blood in that vicinity. The collar bone was very near in its normal condition at my last examination. It slightly twisted, that is, there is a little more distance between this point (demonstrates) on the left side than on the right, and a little backward. The collar bone is attached by ligaments, the dark portion moves with the scapula, and there is a very slight elasticity to it. If the arm is extended and the shoulder is against some solid substance, and then you strike only one blow, and that fractures the coracoid process, it would be likely to fracture the collar bone at the same time, because the collar bone is much more forward near the coracoid process than that is. In a man like Captain McKinley the collar bone extends forward of the coracoid process, perhaps one-half an inch. The muscles covering the chest are the pectoralis, major and minor. The thickest place of the muscular structure is one-half or three-fourths inch. I think probably average one-half inch over the chest. There is a very little muscular tissue covering the coracoid process. They are anteriorily and posteriorily embedded in muscles. The deltoid muscle runs over the shoulder; a thin portion almost covers the coracoid process. If M'r McKinley had fallen with great violence, and had struck the stove or any hard substance, the weight of his body against those two points, I presume, would have broken it. The evidence of the contusion of the muscles over the

coracoid process was that the whole left side of the chest as far as that point was swollen, and this point over here—there was contusion over that point and over the point of the coracoid process. There was no evidence of contusion on the arm or back of the scapula and no swelling there. The 3d and 4th ribs were broken a little outside of the nipple. At the point of attachment of the 3d and 4th ribs to the sternum there was evidence of a separation. There was no depression of
37 these ribs at any point. It was at least three weeks after the injury occurred before the precise point of the injury could be located.

There was no evidence of the fracture of the ribs except the escape of air and breathing of the lungs. I think it is possible for a man of about the same or less weight than M'r McKinley, and who is two or three inches less in height, to fracture the ribs, as I found these, by a blow with the fist. I have seen ribs fractured without any more violence. I have known of a fracture of the ribs by a man falling from his carriage. I do not remember of any fracture recorded as having occured from a blow of the fist. The authorities generally lay it down that no blow is sufficient to fracture the ribs unless it is delivered with an instrument of great weight and accompanied by great violence. D'r Hamilton is considered good authority and has a good many other persons' opinions in his work. There is yet some paralysis of the arm. Atrophy has taken place. I think not more than could be accounted for by the disuse of the arm, but from the length of time there was more than disuse would account for. Paralysis results from some injury to the nerves: in this case, the nerves of the clavicle and collar bone, and connecting nerves passing down to the arm that are derived from the cervical plexus. It injured the axillary plexus. The cervical plexus start from the trunks of the spinal cord, from the vertebrae opposite the cervical plexus derived from the lower cervical vertebrae. There are 7 cervical vertebrae and this plexus of nerves comes out from the 5th lower and there is a connection with the 6th. The axillary plexus is situated right under the collar bone. I think a good deal of pressure would be required upon the collar bone to cause it to press upon the nerves that lead to the axillary plexus and the nerves of the arm. I think the depression would have to be ½ an inch. The clavicle was driven backward I think fully half an inch. The pressure does not have to be downward. Fragments were back indicating the direction of the blow. I could determine that there were fragments back of the point of fracture, because at that point there was more swelling and more tenderness. I could not tell if the blow fell obliquely downward or directly backward. I think the blow coming directly from the front and fracturing the clavicle, the fragments being pressed back half an inch, would press upon the nerve connecting the cervical and axillary plexus. There can be pressure upon the nerves by the fracture of the clavicle when the clavicle is not pressed downward and backward. It depends on how far back it goes and the position of the nervous tissue. I do not know the exact distance of these from the vertebrae. They are merely situated below the skin and fatty tissues of the neck. I discovered the situation of the collar bone in my first examination. I did not put it in its normal condition. All I did was to put on a dressing. He wore the application before I took it off perhaps 4, perhaps 5 weeks. I took it off as
38 soon as possible. At that time I thought the union sufficient to sustain the shoulder joint. It is not necessary to have the fragments of bone touch to form a union. It will be a bony union. For a long time it will be a ligamentous union. There is not a very great dis-

placement now of the collar bone from its normal condition. I think there is no evidence of the fracture now. When the union is formed, if the fragments are not back so that the bones touch, there is a callous for the time being. There would not necessarily be a great callous if the bones did not unite immediately after the injury. I examined M'r McKinley the last time within a week. There is some evidence of a fracture about the point of union as to the upper side of the clavicle. There is a slight difference in their relative position; that is all. I think there is no evidence of a fracture of the ribs present now. I think I perfected a union of the last, the fourth, more than a year after the injury. The last time I noticed air escape I think was during January of last winter. I don't know when the union was complete. I did not during last winter make very much of an examination of the chest. I kept his chest sore by external applications on account of inflammation. I used croton-oil over the whole under portion of his chest. He was at the same time wearing a compress. It was not removed for washing or anything else. In putting on the croton-oil it was put under the compress from below. I told him not to take the bandage off, but to leave it there. He wore it until along in the summer. I put it on in December. The union had not then taken place. The union seems to be perfect now, and is, I think, a bony union; if a ligamentous union it would be difficult to detect it. I think it is a good union. I have never in my experience met a case of the union of a broken bone in the human body after 4 months after the injury. The books lay it down that there can be no union of the large bones after that time, but not that there can be no union of any bone. All the nerves connected with the axillary plexus were affected so as to interfere with motion and with circulation, but not with sensation. I have tested the temperature of his arm and there was loss of temperature. I first noticed the spitting of blood after the injury, the first time I saw him. He spit while I was there several mouths full. It was dark. I don't think it was clotted. It was mixed with mucus, but it was not mixed with mucus in the character of inflammation. There was too much mucus to have it come from the throat and too much air to have it come from inflammation of the lungs. He continued, I think, during that spring, to spit blood at intervals. During the summer, I don't think that there was any hemorrhage. He spit a good deal of blood during last fall and winter. I think immediately after the injury, he ceased to spit blood for that time, within two or three weeks. It occurred again at intervals until hot weather. I saw him during that time and saw the blood and examined it with a
39 microscope. He had a considerable hemorrhage. The blood and mucus together, was a quart or more. He had told me of the injury in his head, and I had known captain before, but knew nothing of his spitting blood before the injury. If he had previously had discharges of purulent matter from the nostrils and mouth, the spitting of blood could not have proceeded from that cause. It come up with a cough from the lungs, and had every appearance of being caused by the wound to the lung. It was venous blood. During the spring he suffered considerable from inflammation of the lung, and had chronic pneumonia. I do not know whether he has it now or not. The last time I observed any evidence of inflammation of lung was last spring about the coming on of warm weather. I have examined his lungs lately and found them much better. I don't think there is any inflammation now and no evidence of tubercles and have seen no evidence of tubercles at any time.

Ques. I will ask you, if the inflammation had subsided, would you

not consider it a permanent cure, and whether you would expect a recurrence of the difficulty from the original cause?

Ans. In my opinion upon the accession of difficulty he would be more likely to catch cold than under any other circumstances.

I expect a recurrence of the inflammation caused by the original injury when the cold weather sets in both from pneumonia and the injury to his ribs. There is now an abnormal condition. There is solidity and condensation of the lung, near the seat of the fracture, and extending around it for some distance, and consolidation of the tissue connected with the ribs. The pleura covers the lung and rib both. There is a probable attachment. The extent of the attachment cannot be determined during life. At first enough air escaped to fill over the whole of the chest coming up on the shoulder and extending back to the clavicle. Anything that fractures the lungs will produce it. There was no wound in the skin. The skin was not broken around the coracoid process, but bruised. At the middle of the following week after he was injured the inflammation was substantially the same as it was when I first saw him on Monday. Had subsided somewhat. I was present when D'r Clinton Helm, of Beloit, examined him. They came into my office. At that time the puffy condition was less, but no other change in other respects.

Ques. I will ask you if this describes the extent of the muscular injury that you found. (Reads from deposition of D'r Clinton Helm): "The pectoral muscles were severely bruised on the left clavicle, and immediately below the left clavicle, and extending over the left nipple, and extending to the outer third of the clavicle, I found the injury." Do you understand that to cover the muscular injury?

Ans. No, sir; that does not describe the injury. It was much greater. The injury extended much below the nipple and above and on to the clavicle. I did not see the doctor make the examination. There was a dressing on the injured part at that time. He did not take it off. It was over the coracoid process. I don't know whether he took it off or not. There was nothing over the clavicle. I was present, but took no cognizance of the examination. The evidence of contusion just over the clavicle and coracoid process was that the skin clear up to the clavicle was discolored and a good deal swollen. The blood had settled. I could tell at that time the precise point of the injury in the region of the clavicle. There was a contusion over the clavicle. It seemed to be almost a connected contusion from the clavicle to below the nipple. I think it was about 15 months before this paralysis of the arm began to pass away. I did not see him all this time. I attended him during Nov., Dec., and January, and saw him frequently during the spring. The paralysis of the arm is substantially receded. It is very much less. There is a sore and tender condition of the glenoid cavity that prevents the plaintiff from moving his arm. I have taken his word for that. Having inflammation, there is apt to be a deposit of lymph in the glenoid cavity. The deposit of lymph is the result of inflammation. There would be trouble in breaking this up, so that he could get the use of his arm. If he used it he might get the use of it. The inflammation in the shoulder joint subsided three or four months after the injury during the spring. I have not had evidence of any other condition of the shoulder joint since.

Ques. Now, doctor, will inflammation in the shoulder joint usually lasting only 3 or 4 months, produce such a deposit of lymph or stiffening of joint as to prevent his getting the use of it afterward?

Ans. The deposit of lymph interferes with its action, depending on

the quantity, if the time is long enough. As to the amount of deposit, it will depend very much on the inflammation.

Ques. You say that this man's ribs have gotten well?

Ans. Yes.

Ques. That his lungs are now sound and have no inflammation?

Ans. There is no inflammation in his lungs.

Ques. That the inflammation subsided in his shoulder joint and collar bone within three or four months from the time of the in-
41 jury; that his clavicle is in its normal condition, substantially, except a slight twist; that the union of the rib and clavicle are so perfect that it can scarcely be detected now that there was any fracture; that there is now no pressure of the clavicle upon the nerves which lay about the arm, and that the paralysis is a great deal less. Will you now explain to the jury what there is left to cause permanent injury to Captain McKinley more than your mere surmises?

Ans. That his lungs having been injured he may be more susceptible to inflammation hereafter. How much injury there may be to the nerve; how much that may be lasting; how long it will take nature to restore it, I cannot tell. How long it will take for the lymph to be absorbed I cannot tell.

The blood spit up by M'r McKinley for the next two or three weeks after the injury was dark colored, darker than from inflammation of the lungs. It was largely mixed with mucus, and to a certain extent that mixture was a complete one; that is, the blood was mixed with air, and mucus through it, and such blood as is known as venous in contradistinction to arterial blood. I did not see any clots. When I was called upon to treat him in October of last year, his trouble was inflammation of the lungs. He had pneumonia at that time of the left lung. The lung was not all involved. The upper portion was free. Both lobes were involved, I think. The physical indications of pneumonia at that time were, dullness upon percussion over a large portion of the left lung; spitting during this time a lighter blood and mucus mixed with air. He spit more or less every time that I saw him for a month or more. This pneumonia in its more acute condition lasted three or four weeks. That is, while he had a more rapid pulse. Did not test the heat of his body with a thermometer during the time of the acute inflammation. His pulse run from 110 to 130, and, I think, when he first came home, as high as 140. During the first of it his skin was hot and dry. Subsequently he was subject to a great deal of perspiration. Two or three months he remained in this unfavorable and somewhat critical condition. About two-thirds of the lung was affected with pneumonia. It was not blocked up so that no air entered, only about two-thirds of it. The deposit has not been wholly removed yet. During that time counter-irritation was kept up and he was kept under the influence of anodynes. I used some astringents. After three or four weeks I used some stimulants. I think his pulse came down to about 100 in about three weeks. I suppose it is generally about 75 to 76. It did not come down to nearly its normal condition until the next April. I think the right lung was not involved during any of the time. In the left side the inflamed state reaches about to or just above the third rib, and there was a little por-
tion at the base of the lung. When I began to give him stim-
42 ulants I gave him whiskey. He took whiskey or ale during the winter. He was not out more than to ride out in the middle of the day in October. It was ten or twelve weeks before the pulse got down towards its normal condition. I think he was out some in seven or eight weeks. I knew there was to be a suit about this since March,

1872. I think this pneumonia was the direct result of the blow. I did not keep a memorandum of when he got up. Do not know what he was doing after he got out. I saw him once in three or four days, and then sometimes once a week, and sometimes once in two weeks, and in the early part of the time frequently. All the physical symptoms which led me to call it pneumonia were, dullness upon percussion of the chest. Upon examination by ausculation, there was increased bronchial respiration; coughing and expectoration of blood and mucus mixed with air. He had fever that increased the rapidity of the heart's action, and increased temperature; furring of the tongue, and ordinary symptoms attending, and constipation. My only evidence that the coracoid process was fractured was crepitus and tenderness. I discovered this by pressing my finger on the process and moving it outward and a little forward. Don't remember that I noticed the effect of the motion of the shoulder joint on the coracoid process. The muscular motion moved the coracoid process very slightly. The muscles that moved the coracoid process were the corracio brocialis and a portion of the biceps muscles.

Redirect examination:

Don't think the clavicle was fractured outside of the trapezoid ligament. Think it was not very far from an inch from the scapular end of the clavicle. My impression is that it was about an inch or a little more from the end of the collar bone.

Deposition of D'r Clinton Helm.

My name is Clinton Helm; age, 43 years; residence, Beloit, Wisconsin; am a physician and surgeon. Have been engaged in that occupation 20 years. Acquired a knowledge of the same at the medical department of the Iowa University, at Keokuk, Iowa. I have known the plaintiff about two years, and have known of defendant for several years. I never attended plaintiff professionally any more than to examine him. I examined him at the office of D'r Johnson, in the city of Beloit, on March 26, 1872. I examined him again the last day of August, 1872, in my office in the city of Beloit. I examined him again October 31, 1872, at D'r Johnson's office. I found a fracture of the left clavicle at the outer fourth, also a fracture of the coracoid process, probably extending into the glenoid cavity, also severe contusion of the pectoral muscles, with considerable extravasation of blood, a probable
43 fracture of the third and fourth ribs, judging from the pneumonic symptoms usual in such cases; also a partial separation of the third and fourth ribs from the sternum. They were apparently caused by a direct force or blow from the front. I concluded that was the cause from there being no external injury on the top of the shoulder or outer side of the arm. He has had, and still has, a severe cough, with frequent hemorrhage and other symptoms of pulmonic injury; also partial paralysis and loss of power of the left arm, all of which are caused by said injury. I last examined him October 31, 1872. A portion of the injuries may be of a temporary character, but a part of them will be permanent. The paralysis will, in my opinion, be permanent, also the loss of power in the arm. The loss of power of the arm is not caused entirely by the paralysis, but by the injury of the coracoid process and glenoid cavity, causing pain in attempting to move the arm.

Cross-interrogation:

The left clavicle of plaintiff was fractured. It was an oblique fracture in the outer fourth, outside of the trapezoid ligament. I think it was

caused by two blows. If caused by a fall, it must have been on some substance having two points that came in contact with his body. The blows were direct. If by a fall, it was direct. Should think plaintiff was about five feet ten or eleven inches high, and would probably weigh from a hundred and seventy to one hundred and eighty pounds. He was apparently in good health except from his injuries.

Int. 9. Supposing plaintiff to have been in his ordinary health at the time of his injury, do you think a man of ordinary physical power, weighing one hundred and thirty pounds, and about 5 feet 8 inches in height could have produced the injury you found upon plaintiff with his fist while the two were standing upon a platform of usual size upon a passenger car?

Ans. I don't think a man of ordinary physical power could, but a man of that size, accustomed to striking, might inflict such injury.

The pectoral muscles were severely bruised. Immediately below the clavicle and extending from the left nipple to the outer third of the clavicle I found the musuclar injury. The appearance was that of a severe bruise. It was near the scapular end, and the scapular end was affected by the injury. There is a permanent injury. It consists in partial paralysis and loss of power of the left arm. It is impossible to say how far the lung may recover. It was a necessary result of the injury. The paralysis is caused by the injury to the clavicle, a portion of it pressing upon the cervical plexus. The loss of power of the arm is due to
44 the injury of the coracoid process and glenoid cavity, causing pain when moved. I did not treat plaintiff for his injuries. Dr. H. B. Johnson treated him.

Deposition of Dana Sherrill.

My name is Dana Sherrill; age, 30 years; residence, Chicago; my occupation is clerical. I know the parties to this suit. I first met the plaintiff on the 15th or 16th day of December, 1861. Simply know of the existence of such a corporation as the Chicago & Northwestern Railway Company. I know of a difficulty that occurred in March last between the plaintiff and a brakeman of defendant at Harvard Junction, Illinois.

Ans. to int. 3. I was on the train on which the difficulty occurred. I saw the brakeman attempt to put the plaintiff off the car. The trouble came from the brakeman questioning the right of plaintiff to have a seat in the ladies' car, plaintiff claiming that he had always occupied that car when riding on the road. There was only two or three ladies on the car. The right of entry to that car was not denied to any other gentleman unaccompanied by ladies, that I saw. I was in that car and not accompanied by a lady; no objection was made to my remaining there. Both the conductor and brakeman used very ungentlemanly language to the plaintiff. The plaintiff was finally allowed to ride in the car.

(Defendant objects to that portion of the answer to the 3d interrogatory of D. Sherrill's deposition touching the ladies' car; objected to by defendant as incompetent and immaterial. Objection overruled and defendant excepts.)

The brakeman was insulting and attempted to bully the plaintiff, and was attempting to drag him out of the car.

Int. 6. How many were in the ladies' car or the car in which the difficulty occurred? How many were ladies and how many were gentlemen? (Objected to by defendant as immaterial and incompetent. Objection overruled and defendant excepts.)

Ans. My impression is that there was about a dozen in the car, one or two of whom were ladies.

Int. 7. Which car did you ride in at that time, and after the trouble? (Objected to by defendant as incompetent and immaterial. Objection overruled and defendant excepts).

Ans. The car in which the difficulty occurred, I entered by the forward door.

Int. 10. Was or not any opposition made to your entering the car? (Objected to by defendant as incompetent and immaterial. (Ob-
45 jection overruled and defendant excepts.)

Ans. There was not.

Ans. to int. 11. I know nothing more except that I have repeatedly while riding upon the defendant's road occupied the so called ladies' car while unaccompanied with ladies without opposition.

(Objected to by defendant as incompetent and immaterial. Objection overruled and defendant excepts.)

Plaintiff rests.

And thereupon, afterward, on the 5th and 6th days of Nov., aforesaid, the defendant offered and introduced in evidence the following testimony to sustain the issues on its part.

Deposition of Judd M. Cobb.

My name is Judd M. Cobb: age, 39 years; residence, Beloit, Wis.: occupation, paper business. I have been acquainted with McKinley about two years: have known of defendant this ten years. I can't tell whether I saw plaintiff on or between the 23d and 26th days of March last or not. During the two months following the 22d of March he was in the employment of the Rock River Paper Company. At intervals during that time he was laid up unable to perform his regular duties. We paid him for his entire time. He was traveling agent for the paper company. The next day after the difficulty with the brakeman at Harvard Junction, he reported at the office about noon and staid an hour or so. Have no distinct recollection of seeing him again for several days.

Cross-interrogation:

The day after the difficulty he reported at the office and perhaps spent an hour or two there. Can't say who was present. Can't state definitely whether I saw him again for several days. During the two months following the 22d of March last I think he was absent from Beloit about two-thirds of the time. I was not with him while he was away.

Deposition of John R. Booth.

My name is John R. Booth; age, 45 years; residence, Beloit Wisconsin; occupation, wholesale paper dealer. Have known plaintiff since a year ago last October, and have known such a corporation as defendant for at least nine years. I cannot state whether plaintiff was engaged in his usual employment during the two months following the 22d
46 day of March last or not. He was a traveling agent of the Rock River Paper Company. I cannot state whether he lost any time or not on account of ill health or sickness during that time. I either saw plaintiff on the 23d or 25th of March, 1872. Cannot now state which day. He came into the office of Booth, Hinman & Co., at Beloit, and sat there and talked. I do not recollect how he came down that day.

I do not recollect of seeing him again for several days. Have seen him drive his horse and have ridden with him. Can't give dates. The mare he drove was a very gentle animal.

Cross-interrogation:

He may have staid in our office from half an hour to an hour. I saw him at the office of Booth, Hinman & Co. I think M. S. Hinman and Geo. W. Frost were present. Think F. A. Cleveland may have been present; am not certain. I cannot tell whether plaintiff was absent from Beloit a great portion of the two months following March 22nd last. If absent, I was not with him. I can't tell now who was with him if I saw him driving a horse at the time referred to.

Testimony of Seymour J. McKinley.

I have at times been subject to epilepsy previous to this injury. It was caused by a wound in my head. I think it was in 1863 I was wounded. They commenced soon after that, and at one time I had the attacks quite frequently. They were not periodical. I had one during the winter previous to the injury. I had no real fit; they were sinking spells. They were not as hard as they used to be. I had a light one in January. They do not attack me suddenly. I can tell one or two days ahead when they are coming on. I have fallen sometimes when they came. They do not come on very suddenly of late. Years ago they did and I would fall. Of late it has not been so for have been very guarded about that, and when I felt them coming on would provide for myself. I cannot tell how frequently I have had them since March, 1872. Could not say that I had not had a dozen attacks. Whether fits or not I can't tell. Have not fallen over. From the effect of the wound in my head prior to this accident I have had discharges of purulent matter from the nostrils, but none from the mouth or throat. I am now in my 34th year. This train was standing with the locomotive end towards Beloit and the ladies' car end towards Chicago. The brakeman was standing on the south side, considering the train was standing east and west.

Cross-examination:

I had not had this epilepsy until I received this wound. The attacks had become less frequent and less violent. I do not remember of having any during the month of March, 1872. When they are coming
47 on I get dizzy and can't see. If I take them in time I can tell when they are coming on. If I lay down they are less violent. I have studied them until I know when they are coming on. I have had them when I was marching with my company and fallen down, but have not had so severe attacks of late. So far as I know I have not had frothing at the mouth. When I was conscious I have not and when I was not conscious I could not tell.

Testimony of Dr. H. B. Johnson.

I was present at an examination of Mr. McKinley to-day (November 5, 1873). In my previous examinations I had not recently removed his underclothes. Sometime last spring I did. Did not state in the presence of Dr. Isham and others that I had never taken off his shirt to examine his lungs. I pointed out to Dr. Isham, Dr. Ristine and Dr. Mansfield, as near as I could, the spot where the fracture was. I think the point I pointed out was an inch from the end.

Testimony of E. Lines.

I live at Harvard, Illinois; am passenger conductor for the Chicago & Northwestern Railway Company; have been such conductor nine years last August. I ran over the Kenosha division between Rockford, Illinois, and Kenosha, Wisconsin, about 4 years, and the balance of the time on the Madison division. There was a rule of the road in March, 1872, which reserved one car to ladies and gentlemen accompanied by ladies, and our instructions were to give the rear car to the ladies and gentlemen accompanied by ladies, as far as possible. And in accordance with these instructions I always told the brakeman not to make a business of allowing gentlemen without ladies to go into that car. I told them not to have any fuss, but as far as possible to keep it for the use of ladies and gentlemen accompanying them. I remember of a difficulty that occurred between one of my brakemen, Mr. Sweet, and Mr. McKinley, in March, 1872. I heard of it that evening. Mr. Sweet commenced work for me, I think, about the 1st of March, 1872. That was his first experience on the passenger train, I think. He had been on the Kenosha division. On that division the trains were all mixed trains, and he had been on one of these trains before coming to work for me, how long I don't know. I had known Mr. Sweet somewhere in the neighborhood of three years, I think, before he came to work for me. He had been farming in the vicinity of Harvard, and I saw him occasionally. His brother broke for me. Previous to this Mr. Sweet had not to my knowledge had any difficulty with the passengers or any person on the train. What I have known of him he has always been very peaceable, was jolly and jovial, but always attended to his business with me without any argument. The brakeman, Mr. Sweet, told
48 me soon after the train started from Harvard. When I came into the car where Mr. Sweet was I took up the tickets in the regular way, and he, Mr. Sweet, told me of the difficulty and pointed McKinley out. I asked Mr. McKinley if he was the man the brakeman had had the difficulty with, and he said he was, and he said that he refused him getting into the car. I told him that was his business to keep men unaccompanied by ladies out of that car. Then Mr. McKinley said that he had rode on the cars for five or six years, and that was the first time he had ever heard of that. I told him it was very strange if he had been riding on the Northwestern Road for five or six years and never heard of that order. He said he had not. He said he ought to have thrown the son of a bitch through the window. I told him that I did not believe he could, that I did not know that he could throw one side of him through. I told him I didn't propose to take his statement for it entirely, that there were others that saw the performance, and that I should investigate it fairly before I did anything in regard to Mr. Sweet. I think that was about all the conversation that transpired. Plaintiff appeared considerably excited. He complained to me that he was hurt. I think he said the brakeman struck him. I think the brakeman came up during the conversation, and he said he had not struck him. There was considerable said, but a year and a half has passed and I could not remember what was said. I think the brakeman said he would put him out of the car if I said so. Don't recollect of his putting his hand on him and saying he would put him out of the car dead or alive. The brakeman was some excited. Don't think he used any abusive language to Mr. McKinley. I did not use any oaths in talking to Mr. McKinley; that is a thing I do not do. I do not use profane language at any time. I have stated the conversation as far as I

recollect. The brakeman did not use any violence in my presence. I don't think the brakeman made a statement of his side of the case in my presence and Mr. McKinley's. Mr. McKinley went to Beloit. I noticed him every time I went into the coach. He did not carry his arm in a sling and did not seem to take especial care of it. I stood right on the ground between the two coaches where he came down when he got off that night. I think he had on his overcoat and a satchel in each hand. One was a ten or twelve inch satchel, the other larger. I had no further conversation with him. I think he said something about reporting me and the brakeman, and I said he could report if he liked, that was his privilege. I did not ask him not to report it, and do not know whether he did report it or not. I reported it myself to the superintendent, both what McKinley said and what the brakeman said.

Cross-examination:

Mr. Sweet came on my train about the first of March. I had no intimate acquaintance with him, but saw him occasionally while
49 working on that division. It is the duty of the brakeman to assist passengers on and off and give directions in regard to where they shall sit. I saw other passengers on the train at the time of the fracas and saw them get off. I might have noticed how these passengers got off and carried their baggage, but not particularly. I do not recollect calling Mr. McKinley a liar. I noticed how McKinley carried his baggage, because he came down the steps right beside me. Mr. Sweet left me some time a year ago this fall, that is, the fall following the fracas. Has not been in my department since then. I believe he has fired some.

Testimony of M'r Barrows.

I reside in Rockford, Ill. Am a conductor of a freight train on the Chicago & Northwestern Railway. Have been running a freight train since the 14th of last July. Previous to that I was a brakeman, and previous to that a baggage-man on the Madison division. Was not braking on the same train with Sweet at the time a fracas occurred between him and McKinley: was baggage-man and brakeman on the Kenosha division. My train left a little after his. I remember this difficulty on that evening. I think my train was standing about two rods from the train on which the difficulty occurred. I was acquainted with Sweet but not with McKinley. This difficulty happened about candlelight in the evening, in March. It was light enough to distingush countenances readily at a distance. I stood on the platform of the coach next the rear talking with Sweet. He was standing on the rear coach his feet up to the steps, his back to the door, pretty close to the door. Did not see the plaintiff go out of the car. Saw him but once that evening. I had been standing there about five minutes when he came and wanted to go in the car. I think the car on which I was standing was lighted. Don't think I had been in it. The plaintiff came along and said he wanted to go into the car. He said that he would go in that car. Sweet said he would not. With that he reached his arm out and opened the door. Sweet kind of shoved him back but he came up again and both stumbled into the car. I don't think they had a clinch. Sweet had his hands in his pockets. I did not see him grab him. They kind of pushed each other and fell into the car and fell down partly. I think Sweet was under. I think McKinley called him some names. He said, "Get out of the way, you son of a bitch." The time occupied was not over five minutes. I did not say or do anything.

After McKinley took his seat he came back and looked for his hat. Sweet gave it to him and he said, "You son of a bitch." Sweet said, "If you will come out of the car I will make you take it back." He said his mother was not a bitch. McKinley said he did not refer
50 to his mother. They were not much excited except when Sweet took him his hat and he called him a "son of a bitch." I did not see any blows struck, and Sweet did not bother him after he got inside the car. The door remained open after McKinley passed in until Sweet came out, and I think it swung to after Sweet came out. I think he came right out and the door blew shut. They went in far enough for the door to close. McKinley may have fallen on the brake-head. I did notice particularly. It was short work after the scuffle began. I think McKinley said, when he came up, that he wanted to go into the car. Don't think Sweet opened the door a little way and stepped aside. The brakeman did not strike the plaintiff at all. I was not excited any myself.

Cross-examination:

I saw Sweet go in the car again after he came out. I heard M'r McKinley call him a son of a bitch. Think he called him so twice. The first time he said, "Get out of the way, you son of a bitch," Sweet said, "I am paid for standing here." According to my recollection when McKinley came out, Sweet said, "Here is your hat." My deposition has been taken in this case once.

Testimony of Stephen Sweet.

I reside near Harvard Junction. Have resided there five years last March. My family reside there. I was a brakeman on a passenger train on the 22d of March, 1872, on M'r Lines' train. I went to braking on the Kenosha division on the 14th day of November of the fall before, on a mixed train. I began to brake for M'r Lines about March 1, 1872. That was the first exclusive passenger train I broke on. I was working for him about 10 months. I left in the last of October or first of November. I was laid off on account of this injury to plaintiff. Have been firing for the company since, on the Wisconsin and Madison divisions. I went to firing about the middle of November and fired on the Wisconsin division till about the first of December. I was taken sick and went home for six weeks, then I got a job on the Madison division and staid there until last March and then quit. Have been farming since. Never had any difficulty except with plaintiff during the time I was braking on the road. I did not know M'r McKinley previous to this time. Had not been drinking liquor or beer at that time, and am not in the habit of it. If I remember rightly, the custom was that our rear car used to go into Chicago. When they arrived at Harvard Junction, another train took the car into Chicago and in the evening they brought the car back, and it was then hitched to our train to go to Beloit. They were late that day, and our car did not go into Chicago. I think the train came in from Chicago at about 7 o'clock and 35 minutes, and left for Beloit at about 15 minutes before eight o'clock.
51 They took supper there.

The first time I saw plaintiff was when he came to the platform to go in the car at the time of the difficulty: I had not seen him go into the car at any time that evening. At the time the train came in from Chicago I was seeing to my train; saw to my headlights and then took my position at the door. Only one lady and two gents had got on before that. Do not remember of any other gentlemen passing

into the car. Was not away any of the time. The door was unlocked. Had two passenger cars and a baggage car on our train that night. The car next to the rear car was the same kind of a car as the rear car, and was lighted at the time of the difficulty and had a fire in it. The wheel-tappers at Harvard had built the fires. They started the fires in my car and lit the lights. Don't know a man by the name of Truman from Broome County, New York. Don't remember whether there were any passengers in this second coach or not. Have no recollection of a gentleman coming to me just previous to the difficulty and my directing him into the second car, and he coming back and telling me that it was cold and not lighted, and my telling him then to go into the ladies' car. It was a pleasant evening, but still it was cold. I was standing on the platform in front of the door of the rear car. M'r McKinley stepped on the platform; I said, "Take the forward car, please"; he said, "No, sir, I am going in here." I said, "My orders are not to allow gentlemen in here unless they are accompanied by ladies." He said, "I don't care anything about your orders, I am going in here. Stand away from the door." Said I, "I am paid for standing in the door, and I am going to stay here." In the mean time he reached his arm around me and unlatched the door. I stood with my hands in my pockets, my side coat pockets. Said he, "You son of a bitch get away from this door," and took right hold of me. Of course I took hold of him when he took hold of me right around my body. I shoved him back against the brakehead and held him there a couple of seconds or so. The platform was a little slippery and he made an effort and got the advantage of me and we both went into the car together. We both partly fell into the car. I think I struck on one hand. I don't remember how he struck. He passed into the car, and when we stood upon our feet he was standing with his back to the rear end of the car, and had hold of my collar with both his hands; I had hold of his also. He then gave me a shove and jerked me off my feet, but I saved myself. This was inside the car. There were a few words said, and finally I went off. In the tussel our hats dropped off. I went and picked up mine and his also. I took it to the door of the car and handed it to him. I said, "Here is your hat, sonny." He said, "You son of a bitch, I will knock the head off of you." I told him my mother was not a bitch, and he would have to take that back. He wanted to know how many pounds I weighed. I told
52 him if he would come out on the platform I would show him how many pounds. He said he was not referring to my mother. I said I took it that way and he must take it back. As I went in the door my heels tripped on the door-sill. I don't remember his saying anything about kicking my face. His position was nearer upright than mine. I had hold of his clothes somewhere. I saw M'r Barrow at the time of the difficulty standing on the opposite platform. He had been standing there probably five minutes. My back was as near to the door as I could get it without standing on the door-sill. Was not excited to any extent until he called me a "son of a bitch," then of course I got a little excited. I did not strike the plaintiff during the difficulty. Am positive there was no striking at all. He did not request me to stand aside and let him in the car. I never opened the door and stepped back for him and for nobody at that time. I had nothing in my hand at that time. We have a leather cuff that we use in breaking, made so that it will buckle on the wrist so that the buckles won't come in contact with the wrist. I had no such cuff on that evening. I did not take him by the collar and push him up between the stove and the first seat against the side of the car. I am right-handed. I know I did not lay my hands

on him after we let go of each other in the car. There was no scuffle in the car. When he jerked me he had hold of me with both hands, one on each side of my collar. When he had taken his seat I went to him alone once after he had called me a son of a bitch and asked him if he was going to take it back. He said he was not referring to my mother. That was all that occurred. I was there with the conductor after that. The conductor asked me if that was the man that I had had the fuss with, and went to him, and I believe asked him about it. McKinley said I was not able to put him out of the car, and I said, if the conductor said so I would put him out lively. I did not put my hands on him. I saw M'r McKinley when he got off the train. Did not notice whether he had any baggage or not. He came up on the platform that I was standing on from the platform of the depot on the south side of the train and the north side of the depot. Did not see the plaintiff go out of the car until he got to Beloit. I had instructions from my conductor to seat gentlemen unaccompanied by ladies in the forward car when I could do so without trouble. I think plaintiff did not say anything about his baggage. I spoke to him in as gentlemanly a way as I could or would. He spoke peremptorily. He reached his right hand around me to open the door. His body touched mine. I did not take my hands out of my pockets until he took hold of me. If I had let myself go in the way he was trying to throw me I would have gone off one side of the platform. When I had the talk with him and the conductor I don't think he claimed that I struck him. If he did I did not contradict
53 him. He made no complaint to me. He took out a book and took the names of persons in the car. I suppose he enquired the names. He was writing in the book. Don't know how many names he gathered. Did not notice which hand he held his pencil in or his book. I think his book was on his knee. He was either writing or holding the book with his left hand. I did not see him move around the car. There was a man sitting beside him, and I think a man and wife sat opposite him. This took place shortly after the train started.

Cross-examination:

I was laid off that road about the 1st of November, 1872. I was at Madison when I was discharged. O. Bridgley, superintendant of the Madison division, discharged me. He didn't give me any reason for discharging me; he called me into the office and said, "M'r Sweet, I am under the necessity of discharging you." I went to firing about the middle of November; then went home about the first of December, remained there some six weeks, and then went to firing again, and fired until about the middle of March, and have been farming since. Don't know how many ladies were in the car from Harvard to Beloit; probably two or three when we left Harvard, and probably ten or twelve passengers in all. Not any of them went in while I was standing at the door. I think I was at the door when the lady and little girl passed in; I think I stood there from that time until the train started. When I left the front of the car probably a half dozen were there. I think I was there from the time the lady and little girl entered until I had the fracas with McKinley. There was no other brakeman engaged on that car that evening at Harvard Junction. There was a baggage man. In going up to Beloit it was our usual custom to keep that back car for ladies, and gentlemen accompanying them. It generally went to Chicago, but did not that day because it was late. That train was made up in Chicago, and the rear car usually taken off and run up to Beloit. I think it was the usual custom to put all the Beloit passengers in the Beloit car, whether gentlemen accompa-

nied by ladies or not. Did not use profane language at the time of the altercation with plaintiff on the platform. I did after I got into the car. I did not shove him back when he reached around me to open the door. When I fell into car I fell on my left hand and grabbed hold of McKinley with my right. When I recovered myself I took hold of him again. McKinley had hold of my coat collar and I had hold of his coat collar. His coat was an overcoat with a cape on it. I had hold of the cape on one shoulder. He jerked me off my feet towards himself. My deposition has been taken in this case. Don't recollect of having testified anything of his having hold of my collar with both hands.

54 Redirect examination:

As I went into the door he was on my left hand near the door. He passed between me and the door on the other side from the stove. There was a water-closet in the rear end of the car. The seats came up within a foot, I should think, of the door. There was a side seat right back of the door; they were the ordinary seats with side pieces up. I could not tell whether the plaintiff struck these seats when he passed over me; he went in quite violently. I could not say that he struck upon any of the door-sill. The baggageman was not at the front door part of the time, but was attending to his business.

Stephen Sweet recalled.

Ed. Hayward employed me as fireman. He was a master-mechanic at Oshkosh. He knew that I had been discharged and what for. I fired for him from about Feb. 1st to along in March. Yankee Wellington, master-mechanic on the Madison division, employed me at Harvard. I was firing on a freight train. I run both ways from Oshkosh to Marinett. I was on the passenger a little over a week, and on freight the rest of the time. I went wherever I was sent. Most of the time on the Harvard division I fired a switch-engine. Have never been a brakeman since my discharge in November.

Cross-examination:

Firemen frequently became engineers on the road. It is in the line of promotion.

Testimony of Captain Estabrook.

I am general claim agent of the Chicago & Northwestern Railway Company, and have been such agent for the past six or seven years. I do know how and for what the brakeman, Sweet, was discharged. He was discharged about the 1st of November at my suggestion by order of M'r Hughitt. I was present when the telegram was sent by the general superintendent to the superintendent at Madison. The depositions in this case, of parties more particularly present at this scene, on the part of the plaintiff had come to my knowledge, and I made up my mind that if he was such a man as those depositions indicated he was such a man as ought to be discharged.

Cross-examination:

This discharge was made about the last week of October or first of November. I had not seen the depositions that had been taken on the part of the defendant at that time. I think they had been taken and filed. I had read most of those taken on the part of the plaintiff.

55 This suit was then pending. I do not know for what reason the company re-engaged M'r Sweet. It was not done by my request,

and was done without my knowledge. I look after the interests of the road. I was looking after the facts in the case, in the fall, when these matters were brought to my attention.

Deposition of Dr Frank H. Hamilton.

Int. 1. State your name, age, place of residence, and occupation or profession.

Ans. Frank H. Hamilton; age, fifty-nine; place of residence, the city of New York; and occupation or profession, physician and surgeon.

Int. 2. If you are physician and surgeon state how long you have been such, and particularly the extent of your practice and experience as a surgeon.

Ans. I have been physician and surgeon since 1833. During most of my life I have been occupied in the department of surgery. Since 1840 I have been a teacher of surgery, and during all this time since 1840 I have been connected more or less with public hospitals, and have also been engaged in a large surgical practice.

Int. 3. Are you the author of any work or works on surgery, and if so state what they are, and where published.

Ans. I am the author of a treatise on fractures and dislocations, the first edition of which was published in 1840, and which has reached its fourth edition; also of a treatise on military surgery, the first edition of which was issued in 1861, and which has passed to a second edition; also of a general treatise on surgery, published in 1872, the second edition of which is now in press; also of a volume on deformities after fractures, published in 1855. I also publish, as editor, the Surgical Memoirs of the War of the Rebellion, under the auspices of the sanitary commission.

Int. 4. Are you acquainted with the parties to the above-entitled suit? If yea, how long have you known them?

Ans. No.

Int. 5. The plaintiff, about 35 years old, weighing 180 to 200 pounds, in apparent good health, claims to have received the injuries hereinafter stated, by two or more blows with the fist of a brakeman of defendant, weighing 160 to 180 pounds, while both were standing on the platform of a stationary passenger coach. The plaintiff was not knocked
56 down, nor from the platform of the car, but immediately afterwards reached behind the brakeman, opening the door and pushing the brakeman into the car so violently that he fell with his back upon the car floor, and plaintiff passed into the car and took a seat. Two hours afterwards plaintiff left the car, carrying with him two ordinary-sized carpet-sacks or valises. The next Saturday plaintiff was out upon the street driving a horse and apparently attending to his ordinary business. On the next Monday a surgeon examined his injuries and described them as follows: A fracture of the left clavicle at the outer fourth; also a fracture of the caracoid process, probably extending into the glenoid cavity; also severe contusion of the pectoral muscles, with considerable extravasation of blood—a probable fracture of the third and fourth ribs, judging from the pneumonic symptoms in such cases; also a partial separation of the third and fourth ribs from the sternum. There were no external injuries on the top of the shoulder or outside of the arm. The fracture of the clavicle was outside the trapezoid ligament. The muscular injury was immediately below the clavicle, and extending from the left nipple to the outer third of the clavicle. The appearance was that of a severe bruise. In the opin-

ion of the examining surgeon the injury will be permanent from two causes:

1. Partial paralysis of the arm by a portion of the clavicle pressing upon the cervical plexus.

2. Loss of power of the arm due to the injury of the coracoid process and glenoid cavity, causing pain when moved. Plaintiff has had, and still had November 1st last, a severe cough with frequent hemorrhage and other symptoms of pulmonic injury.

From the foregoing statement of facts you are requested to give your professional opinion upon the following questions:

1. Is it probable or possible that plaintiff could have carried an ordinary carpet-bag in each hand two hours after the injury, and give your reasons?

Ans. It is scarcely possible, inasmuch as the injuries supposed or assumed were of an extraordinary nature, in point of severity, and implicated muscles and bones which would necessarily be brought into use in carrying a weight. It would hardly seem possible that he could have held firmly in each hand for some days thereafter a weight equal to one pound.

2. Is it probable or possible that he could have driven a horse next day afterwards? And state the physical condition that must have existed the next day by reason of such injuries.

Ans. It is scarcely possible for the reasons already assigned
57 in the last answer. In addition, I would state that the natural process of inflammation would increase the disability.

3. Is it probable or possible that the injuries described could have been produced by blows from the fist of the brakeman, under the circumstances disclosed by the foregoing statement of facts? And state your reasons for the opinion you may have.

Ans. No; the ribs cannot be broken, when in their normal condition, except by blows of the greatest severity, by which I mean to say, by blows inflicted by weapons of great weight, and used with great force; or by that class of accidents usually called "crushing accidents," and which cannot be represented by the force of a blow by the naked fist. The reason for this is, that the ribs with the cartilages are elastic and finally give way only under a force little less than is sufficient to cause death or fatal injuries of the vital organs, and for the additional reason that the ribs at this point are covered by a heavy mass of muscles. The coracoid process is too firm to be broken by the fist, and there is probably no example on record where it has been shown to have happened in this manner. The same is true of the outer fourth of the clavicle. Besides there is no evidence that the force of the blow was expended in the direction of the clavicle. If the clavicle had been broken by a blow of any kind there should have been more or less of contusion and swelling at or near the seat of the fracture.

4. Is it possible to fracture the clavicle, as stated, by blows from the fist struck between the left nipple and a point immediately below the outer third of the clavicle and not touching the clavicle; and particularly whether a fracture of the coracoid process could be produced in such a way, the patient wearing woolen clothing and overcoat? And state fully the reasons for your opinion.

Ans. No, it is not possible to fracture the clavicle; nor do I think it possible in this manner to break the coracoid process, and for the reasons:

1. That there is no authenticated case on record in which it has thus happened.

2. That there are not probably more than three or four examples of fractures of coracoid process, including the glenoid cavity, upon record in the history of surgery. It is doubtful if any such case has ever been recognized during the life of the patient, and some doubt remains as to whether these cases which have been supposed to be examples of this fracture, where the examination has been made several years after death, were actually such fractures as above described. Even a
58 direct blow inflicted upon the coracoid process falling upon it with immense violence fails generally to break the process, for the reason that the scapula of which this process is a part moves freely upon the chest and recedes from the force of the blow. An additional reason why it should not have been broken in this case is found in the amount of muscle and fat, which must have covered the process, and in the amount of clothing with which this part of the body was covered.

5. Give your opinion and the reasons for it as to the possibility or probability of the fracture of the ribs, and separating them from the sternum, as described, by a blow or blows from the fist under the circumstances above described.

Ans. I don't believe it was possible thus to fracture the rib, and for the reasons already given in my last answer. As to a partial separation of the cartilage from the rib, it is unlikely to occur when the rib itself has yielded to the force of the blow. Moreover, its existence, that is, a partial displacement, could scarcely by any possibility have been recognized on the third day, the overlying parts being swollen and tender.

6. Now, suppose it to be true that the brakeman did not strike the plaintiff at all, but that they, both being powerful men physically, had a violent scuffle on the platform of the car, and finally plaintiff obtained the advantage of the brakeman, opened the door of the car, pushed the brakeman in and down upon the car floor, as above stated, and partly fell with him, and not knowing whether plaintiff struck his breast or shoulder against the car door, or the ends of the car-seats, or not, from this statement of facts can you form an opinion as to the probability or possibility of his receiving the injuries described? And if so, state the same fully.

Ans. In answer to this question I observe that in the absence of any precise knowledge as to the amount of force with which he fell and the precise manner in which he struck, and upon what he struck, it would be difficult to give an opinion as to the precise injury which would ensue. It would seem possible that he might break a rib or two, but it would not appear to be possible that he should break the coracoid process and the glenoid cavity in the manner supposed, or that he should break the outer fourth of the clavicle without any signs of contusion at or near the point of fracture.

7. Which state of facts as to how the injury occurred is the most probable or reasonable to account for the injuries, the one claimed by the plaintiff or the one given in the last question above?

Ans. The one given by the last question answered, but neither furnish satisfactory reasons for the complicated injuries assumed.

59 8. State whether, in your opinion, either of the above statements of facts are sufficient or reasonable or probable to account for the injuries described. State fully.

Ans. No; most certainly not.

9. Is fracture of the coracoid process extending into the glenoid cavity frequent?

Ans. It is not, as I have before stated.

10. Can such fracture be produced, even by direct violence, except by crushing?

Ans. No.

11. Can a diagnosis of this fracture, with that of the fracture of the third and fourth ribs, be correctly made under the circumstances detailed above? And state the reasons.

Ans. A diagnosis of the fractures of the ribs would have been made certainly with great difficulty at the time and under the circumstances supposed, and for the reasons already given. The reason for supposing the ribs to have been broken given by the surgeon who saw him on the third day, viz, that he had certain pulmonic symptoms, are totally insufficient, and never can be accepted as evidence of fracture, inasmuch as a severe blow without fracture may produce all the pulmonic symptoms which are ever present in a case of fracture.

12. Can hemoptysis be similated or feigned easily by a patient?

Ans. Undoubtedly, and is most frequently by "malingerers" (that is, persons practising medical or surgical impositions or frauds), by drawing blood from the gums.

13. Would a patient suffering from hemoptysis, as the result of such injuries as described above, be able to travel over the country and do business?

Ans. I should not think that he could engage in active business and endure the labor incident to every-day business life.

14. State what other matter or thing you may know of benefit to the defendant.

Ans. I know nothing. I would add, however, that a fracture of the clavicle in the outer fourth could not by any possibility so press upon the axillary plexus of nerves as to cause paralysis of the arm, for the reason that it is wholly removed from the situation of this plexus. I mean by axillary plexus the same which was intended in the in-
60 terrogatory where the words cervical plexus was used, the use of which was evidently an error, the cervical plexus being in the neck and not under the clavicle.

Cross-examination:

Int. 1. May not a person receive injuries of the general character described in the fifth direct interrogatory, and yet at the time not fully understand or know the whole extent of the injuries he has received?

Ans. Certainly.

Int. 2. If a person should receive injuries of the general character described in the fifth direct interrogatory, might not a day or two elapse before he became fully aware of the extent of his injuries?

Ans. Certainly.

Int. 3. Did you ever attend professionally a person who had received the exact injuries described in the fifth interrogatory? If so, state when, where, and give the patient's name and address.

Ans. No.

Int. 4. Does not the strength of the bones of the shoulder, arms, and also the ribs differ in different persons?

Ans. Yes.

Int. 5. Does not the strength of the bones of the shoulder, arm, and also of the ribs depend somewhat upon the bodily health of the person?

Ans. Yes; syphilis or other specific maladies would make a difference.

Int. 6. Can you always determine from a description of a fracture or wound just how it was produced?

Ans. No; not always, but most generally.

Int. 7. Is not the effect or result of a blow liable to be varied by the force with which it was struck, by the position of the person receiving the blow, and many like circumstances?

Ans. Certainly.

Deposition of Dr Edmund Andrews.

Questions propounded to this witness the same as those propounded to Dr Hamilton. (See deposition above.)

61 Ans. to int. 1. Edmund Andrews; age, 48; Chicago; profession, a surgeon.

Ans. to int. 2. 21 year's experience. Professor in Chicago Medical College. Surgeon of Mercy Hospital. Late surgeon in the Army.

Ans. to int. 4. No.

Answers to the subdivisions of int. 5 as follows:

1. It is possible but not probable.

2. It is possible but not probable.

3. Sufficient violent pounding with the fist might produce all the injuries except that of the glenoid cavity. That is so far out of the reach of such blows. Fracture of the coracoid would not extend into the cavity.

4. Fracture of the clavicle could not be produced by blows falling below it and not touching it, because the force must strike it in all ordinary cases, or there will be no fracture. Blows below the clavicle might possibly fracture the coracoid process, because that is below the clavicle, but it would be improbable through an overcoat, as the process lies pretty deeply in the shoulder.

5. There is no violent improbability in the fracture of the ribs from strong blows of the fist, because the ribs are slender and exposed to the force. The separation of the cartilages from the sternum is less probable, but might occur.

6. If the plaintiff fell in a scuffle without being struck by the brakeman, he might thereby receive all the injuries except that of the glenoid cavity, because the force of a fall against hard objects, in such circumstances, is sometimes great enough to fracture both ribs and clavicle. For the same reason the cartilages might be displaced.

7. Such a list of injuries is impossible in either case, but the fracture of the coracoid process and the displacement of the cartilages would be more likely to result from striking hard, angular objects, like the corner of a car-seat, than from a fist.

8. The injuries described are not easily accounted for by either theory, especially that of the glenoid cavity. I am sure there were great errors in stating the character of the injuries.

9. It is unknown, except from bullet and other crushing force.

10. No.

11. The glenoid fracture mentioned, if such a thing occurred
62 with no wounds through which the finger could be exposed, it could only be diagnosed by dissection after the death of the patient. Fracture of the 3d and 4th ribs could sometimes be detected, if the parts were not to' fat nor too much swol'en.

12. Hemoptysis can be very easily feigned.

13. Hemoptysis from blows is not apt to last long. If it should, however, I think some patients might travel on business to a moderate extent.

Cross-interrogatories:

Ans. to cross-int. 1st. Yes.
" " 2nd. Yes.
" " 3rd. No.
" " 4th. Yes.
" " 5th. Yes.
" " 6th. No.
" " 7th. Yes.

Deposition of D'r Moses Gunn.

Questions propounded to this witness the same as those propounded to D'r Hamilton.

(See deposition of D'r Hamilton above.)

Ans. to int. 1. Moses Gunn, practicing surgeon and professor of surgery in Rush Medical College, Chicago, Illinois.

Ans. to int. 2. I have been 27 years in an active practice, and 23 years a professor of surgery in the University of Michigan and Rush Medical College.

Ans. to int. 4. I am not acquainted with the plaintiff. I know of the existence of the defendant by common report only.

Answer to the subdivisions of int. 5, as follows:

1. It is not, with the injuries described. Motion at the shoulder joint would produce such extreme pain, both in the joint and on the breast, as would utterly prevent the patient from even attempting such an effort.

2. It is not probable. It would have been difficult in the extreme for him to have gotten into an ordinary vehicle. After he was in, riding would have been painful, and he could have used only one hand in driving. With the injuries described there would have been inflammation of the shoulder joint, pleurisy, pneumonia, and probably emphysema; and it is quite certain that the patient would have been in bed and under the influence of anodynes.

63 3. It is simply impossible to have fractured the clavic*al*' external to the trapezoid ligament by a blow of the fist delivered from the front. If such a blow should strike the clavicle at or just internal to its middle where it is most prominent, it is barely possible (not probable) that it might produce a fracture at the point of contact, but it is simply impossible that it should fracture the bone in its outer fourth. As to the fracture of the coracoid process extending into the glenoid cavity, the fist of a giant wielded by a two-giant power could not accomplish it. This process is so deeply located and so strong at its base that it could be broken in the manner described only by a force which was applied over a very small surface corresponding with the size and situation of the process, or by a crushing force which would inflict also a much more extensive injury.

4. It would be utterly impossible so to fracture the clavicle, because blows upon the point of the chest which did not touch the clavicle would have no more influence upon that bone than upon the jaw or any other bone in the body.

As to the coracoid process, it would be absolutely impossible for reasons already stated in answer to subquestion No. 3. The presence of an overcoat would afford additional protection.

5. A powerful blow of the fist might possibly fracture a long rib, but would not be likely to fracture a short one like the third or fourth, particularly the third. The shortness of these bones, and the lesser size of

the circle which they describe, gives them greater relative strength. It would be next to impossible for a blow of the fist to fracture these two ribs and at the same time separate their attachment to the sternum. Only a crushing force would be likely to accomp'ish this.

6. Both hypotheses are equally insufficient to account for it. They could not have been inflicted in either way.

7. Already answered in answer to subquestion No. 6.

8. Already answered in answer to subquestion No. 6.

9. It is extremely rare.

10. Already answered in reply to subquestion No. 3.

11. A diagnosis of these fractures would, in a majority of instances, be based entirely upon probabilities, and this case would present the usual uncertainties.

12. It can.

13. He would not.

64 Cross-interrogatories:

Ans. to cross-int. 1. He might not know the full extent of them, but he would know that they were sufficiently extensive to render his left upper extremity extremely useless, and make breathing a distressingly painful process.

Ans. to cross-int. 2. Two minutes would not elapse before he would be fully aware of having sustained extremely painful and serious injuries, though a day or two would undoubtedly develop these qualities still more fully.

Ans. to cross-int. 3. The injury described in the 5th direct interrogatory speaks of a "portion of the clavicle pressing upon the cervical plexus." Now, the cervical plexus is entirely above the clavicle, and could not possible be pressed upon by it. If the surgeon meant (as he probably did) the axillary plexus, such pressure would be equally impossible if the fracture was outside the trapezoid ligament where he locates it, for the plexus is internal to that ligament and subsequently the relations of the clavicle to the plexus are unaltered. Such a combination of injuries is a physical and anatomical impossibility. Therefore, I never did attend professionally a person who had received these exact injuries. I attended a similar injury produced by crushing force in the person of August Thiele, 203 Blue Island avenue, Chicago, in September, 1871.

Ans. to cross-int. 4. It does.

Ans. to cross-int. 5. Not materially upon general health. The bones of the very feeble are sometimes stronger than the bones of the robust. Simple feebleness of the health will not effect the strength of the bones. Special diseases may.

Ans. to cross-int. 6. I cannot.

Ans. to cross-int. 7. It is.

Testimony of Dr Ralph N. Isham.

I reside in Chicago, Illinois; am a practicing physician and surgeon; have been in the practice since 1854; I have been especially connected with the Chicago Medical College, and United States Marine Hospital of Chicago; have had charge of the Military Hospital during the war, and was surgeon-in-chief; I examined the plaintiff yesterday; I found nothing to indicate that there had been any ribs broken; I speak of ribs on the left side.

Q. Suppose there had been a fracture of the 3rd and 4th ribs, and

one of them had been driven into the lungs, puncturing it and causing expectoration of blood and mucus, and that at the end of 10
65 months or 8 months there had been no union of the rib, either bony or cartilaginous. Please state whether, if there should be found a union of it now, if it could with certainty be detected, and give your reasons for it.

A. A fracture of two ribs produced by violence, producing laceration of the lungs, would betoken a degree of violence that would totally incapacitate him from being here at the present time. It would incapacitate him from going about. There is a condition which is called ununited fracture, where bones refuse to unite after having been broken. If such condition lasts for 10 months, it is not reasonable that at the end of 10 months union will take place without surgical interference. With this condition of ununited fracture, lasting for 10 months, there would be no difficulty in detecting it by the examination of yesterday.

Q. Why would there be no difficulty?

A. Because I should not expect to find a union.

Q. Any kind of a union?

A. In ten months; no, sir.

Q. If the rib is broken and does not unite in eight months, is it possible to ever have a union afterwards without surgical operation; and, if so, what kind of a union?

A. There would be a union of the ligaments. A false union, or a union of the ligaments occurs, but what more frequently takes place in such cases is eburnation. The bones become round and smooth, and play with facility around each other, and it remains as a permanent condition. Rare instances of another kind of ununited fracture are given, where heavy rings are formed around the broken ribs, and they fail to unite, so that they present a clubbed appearance and a permanent condition, results of heavy rings around the ribs.

Q. In either of the cases just described by you could you have detected the evidence of fracture by your examination yesterday?

A. Yes, sir.

Q. How long a time usually elapses after the fracture of the rib, one of the 3rd or 4th ribs, before a union of it takes place at all?

A. Much depends upon the degree of injury associated with the fracture and the delays arising from constitutional or local causes. A simple fracture I could expect to heal in 6 weeks, or less time than that; but sometimes there is such a degree of injury connected
66 with the fracture that the union is delayed. Sometimes this injury is a wound. There is a connection between the healing of the wound and the fracture. The union of a broken bone is almost always delayed until the wound is healed. Thus in a severe compound fracture, which is an injury where there is an external wound, a union is delayed until the wound is healed, always.

Q. Explain why if a union of broken ribs does not take place within eight or ten months it does not take place at all.

A. Because the ends of the bones have assumed a permanent condition, and this permanent condition may be grouped under one of the three heads already given: eburnation, ligamentous, or the other where a union has been attempted but has been interfered with, and rings of bone are formed giving them a clubbed appearance.

Q. From the history of the case and your examination can you offer an opinion with any degree of certainty and positiveness whether this plaintiff had his ribs broken, as claimed, in March, 1872?

A. I can.

Q. State what your opinion and judgment is.

A. I have no hesitation in saying in my opinion that he had no fracture of the ribs as claimed.

Q. Now, please suppose he had such a fracture of ribs as indicated by the above questions and answers; could the plaintiff have conversed with passengers in the usual way immediately afterwards, taken memoranda of names of witnesses and their addresses, used both hands, and after riding an hour and a half, carried two carpet sacks and an overcoat from the train, go home and remain until the next Monday, two or three days, without consulting a physician, and being about upon the streets during the time? And if he could not have done all or any of these things, with such a fracture of the ribs, state why not, and what would have been his physical condition.

A. It would have been impossible for a man in his condition as described, to have done most of these things. I do not know of any pain more acute than that associated with a broken bone, nor do I know of any that exceeds that of a broken rib lacerating the lungs. The patient could hardly converse, his breathing would be very painful. Involuntarily he would support the side of his chest with his hands, his breathing would be short, interrupted, difficult, and accompanied with expressions of pain that would be unmistakable to a by-stander.

67 Much less could he carry a carpet sack and overcoat and help himself from the platform of a car, and walk off unconcernedly. It is too absurd to talk about.

Q. Under such circumstances could he leave the car and walk alone?

A. I think not without some assistance. Somebody would have to carry his carpet sack for him.

Q. How long could he remain up and about without being confined to his bed after receiving such injuries?

A. He would want to go to bed as soon as practicable. He certainly would not want to go around three days before his wounds were dressed.

Q. Could he?

A. He could, possibly, but would not if he was in a civilized community.

Q. Have you treated such cases of fracture of the ribs with puncturing of the lungs?

A. Oh, yes; I have a case now under treatment of fracture of ribs, produced by an injury without this complication of laceration of lungs, n which the patient suffers intense pain.

i Q. You may proceed with the statement of the symptoms of this patient.

A. The symptoms of broken rib are the ordinary symptoms of broken rib. I do not know that I could do any better than to read the symptoms from some standard work.

(The doctor reads from "Holmes' System of Surgery, 2d edition, 1870, Vol. 2, page 557," under head of "Fractured Ribs.")

Q. Now, suppose there is also added to that, puncturing of the lungs by reason of this fracture?

A. The pain would be even more intense. There would be more shock.

Q. Do you remember how many cases of fracture of the ribs you have had where the lungs were lacerated?

A. No, sir. Within the last two months I have had two cases of fracture of ribs. I think I see one a month and more than that. By a little prompting of my recollection I can call up a good many. It may be

that it is because of having a great deal to do with railroad injuries.

68 Q. About what proportion of these fractures of ribs are they driven in and lacerate the lungs?

A. There cannot be a rule about that. It would take a great mass of statistics. The fractured rib driven in the lung indicates a great degree of violence, such as being crushed between the cars or of being run into by the pole of a wagon, or a man may be thrown against the sharp corner or edge of a sidewalk. They are infrequent, the fracturing of ribs with injury to the lungs. They are a very painful injury.

Q. State whether in your judgment it is possible or probable to produce a fracture of the ribs of the plaintiff, by a blow from the fist of a person, and lacerating the lung?

A. It is not at all probable through the clothing.

Statement of case to witness.

The plaintiff, about 33 years old, weighing from 180 to 200 pounds, in apparent good health, claims to have received the injuries hereafter stated, by two or more blows with the fist of a brakeman of defendant, weighing 160 to 180 pounds, while both were standing on the platform of a railroad passenger coach. The plaintiff was knocked partially down, and into the car, and immediately afterward the plaintiff was struck again, while standing with his back against the car, on the 3rd and 4th ribs. Immediately after this, plaintiff seized the brakeman with his right hand and jerked him down upon the floor of the car, and raised his foot over his face, with the expression that he could kick the face off of him. He then took his seat in the car, made memoranda of the names of witnesses, made no complaint of feeling or suffering any pain to any person, left the car about an hour and a half afterwards, carrying with him two carpet-sacks and an overcoat, and apparently without difficulty. On Saturday, the next day, he was about upon the street, apparently attending to his ordinary business. On the next Tuesday, a surgeon examined his injuries, and describes them as follows: "A fracture of the left clavicle at the outer 4th, also a fracture of the coracoid process, probably extending into the glenoid cavity; also severe contusion of the pectoral muscles with considerable extravasation of blood, and a probable fracture of the 3rd and 4th ribs, judging from the pneumonic symptoms in such cases; also a partial separation of the 3rd and 4th ribs from the sternum. There was no external injury on the top of the shoulder or outer side of the arm; the fracture of the clavicle was outside the trapezoid ligament; the muscular injury was immediately below the clavicle, and extended over the left nipple to the
69 outer 3rd of the clavicle. The appearance was that of a severe bruise. In the opinion of the examining surgeon, the injury will be permanent from two causes:

1. Partial paralysis of the arm, by a portion of the clavicle pressing upon the cervical plexus.

2. Loss of power of the arm due to the injury of the coracoid process pressing the glenoid cavity, causing pain when moved. Plaintiff had had, and still had Nov. 1st last, a severe cough, with frequent hemorrhage and other symptons of pulmonic injury. From the foregoing statement of facts, you are requested to give your professional opinion upon the following questions:

Q. Is it probable or possible that plaintiff could have carried two car-

pet-sacks, and could have put on his overcoat alone two hours after such an injury, and give your reasons.

A. It would be physically impossible for him to have carried two carpet-sacks or anything. He could not put on his overcoat; it would be physically impossible for him to have done so. The group of injuries which are described there would indicate a degree of violence to have produced them that would have placed the patient in a critical condition. He would have been suffering not only intense pain, but from such a shock of injury that would have laid him cold and pulseless upon the floor. The arm would have hung useless by his side, and had he had the power would have been supported by the other, much less to have carried anything in his arm. Then add to the injury to the shoulder, which would have produced this alone, the fracture of ribs and laceration of the lungs, makes the case a mass of improbabilities. I give you my opinion on this statement that has just been read.

Q. Is it probable or possible, with the injuries before described, that he could have been about the streets apparently attending to his ordinary affairs for two days and a half after receiving the injuries, and without having been dressed or attended to by a surgeon, voluntarily?

A. No, sir, neither. It is possible under certain conditions. My opinion is made up on this statement of facts, but there is just one possibility that this could have happened, that is, that he could not get it; but that is not an element in the statement here.

Q. Is it possible or probable that the injuries described could have been produced by blows from the fist of brakeman, under the circumstances described by the foregoing statement of facts, and state your reasons for the opinion you may have.

70 A. No, sir; it would be physically impossible for any living man to produce those injuries with the closed fist alone. They are a class of injuries which are only produced by such a degree of crushing violence as a man could not produce with his unaided fist through clothing.

Q. In this connection, state why the coracoid process cannot be broken by blows from the fist.

A. The coracoid process could hardly be broken by the fist: 1st, because of the shape and general character and powers of resistance; 2nd, from its position, and 3rd, because it is so deeply embedded in the soft parts, and then again because a blow received upon the coracoid process, here to be associated with fracture, must necessarily involve a fixedness of the scapula. The scapula is a movable bone, without any of the muscular attachment. It is that that admits of the great latitude of motion of the shoulder, and to break this coracoid process we must have the scapula fixed, and a blow received then upon the coracoid process would simply rotate the scapula, unless the violence was of a sharp character, such as might be produced by a gunshot wound. A bullet would be driven through there, and without moving the scapula, because it is done so sharply.

Q. Now, doctor, suppose the shoulder was fixed against a door sill at a point opposite or posterior to the coracoid process, and the blow should be received on the coracoid process sufficient to fracture it, extending into the glenoid cavity, what effect, if any, would be produced on the surface directly posterior to it?

A. I should think that the surface directly posterior to it would be broken too. It would break the acromial process.

Q. What evidence would there be, if any, of contusion on the back of the shoulder under such circumstances?

A. I should expect to find contusion.

Q. Would it be otherwise?

A. There would be contusion, but I would expect to detect it by an examination of the parts. A contusion sometimes is not apparent where the part contused is covered with clothing. I have seen contusion with no apparent discoloration at the time, but after a time the discoloration comes on. Sometimes the black and blue appearance does not show itself until after a day or two.

Q. If the hurt took place on Friday evening would it be visible on the next Monday?

A. Yes, sir.

71 Q. Is it possible or probable to produce fracture of the clavicle as stated, by blows from the fist, struck between the left nipple and a point immediately below the outer third of the clavicle, and not touching the clavicle, and particularly whether a fracture of the coracoid process would be produced in such a way, the patient wearing ordinary woolen clothing.

A. First, with reference to the clavicle, I say, no. Fractures of the clavicle are produced in one of two ways, either by direct violence or indirect violence. By that I mean violence applied to the part where a fracture occurs, or violence applied to a part remote from the place where the fracture occurs; but a fracture from a blow received upon the shoulder fractured then indirect, in almost every instance fractures it at a given point. I have answered the second part of your question pretty much before.

Q. Show the glenoid cavity.

(The doctor does so, pointing the cavity out on a portion of a skeleton.)

Q. I will ask you if this scapula, clavicle, and humerus are attached by the natural ligaments?

A. Yes, sir; it has never been taken apart. It is trimmed up a good deal more than it should be. The fracture of the coracoid process is one of the rarest fractures known. I have authorities on that subject and will produce them.

(The doctor reads from "Todd's Encyclopedia of Anatomy and Physiology," page 600. Also from "Mulgignes' Treatise on Fractures," American edition of 1859, page 412. Also from "Treatise on Fractures," by D'r Robert W. Smith. He does not mention it at all, and Hamilton, the American authority, not read, as the defendant has his deposition which they read in which he spoke of it much more than he does in his book.)

Q. When the arm is extended at right angles with the body, how far is the coracoid process from the nearest portion of the bone of the humerus?

A. It can be brought into very close relation with it, the bone of the humerus. By extending this bone of the arm, we rotate the head of the bone in the glenoid cavity, and as we continue to extend the arms up over the head, we bring the neck and head in close relation with this coracoid process.

Q. I want to know when the arm is extended at right angles?

A. Well, in ordinary subjects I should say that there was nothing intervening except these ligamentous tissues. I would say one-half or three-fourths of an inch.

72

Q. Now, with the arm extended in this manner, a direct blow delivered upon the head of the coracoid process sufficient to fracture it,

what effect would that produce upon the head of the humerus, as to dislocating it, or otherwise?

A. I don't think it would produce any specific effect upon the humerous. It might or might not.

Q. Is it possible for a single blow of the fist to be delivered so as to fracture the coracoid process, and also the clavicle within an inch of the scapular end of the collar bone or clavicle?

A. No, sir; it would not fracture either, much less both of them.

Q. Where is the trapezoid ligament attached to the collar bone? How far from the scapular end in a man of the size of M'r McKinley?

A. About an inch, or about an inch and a half.

Q. Just show the trapezoid ligament, and how it is attached.

(The doctor shows the ligament on his plates as requested.)

Q. Suppose the collar bone of the plaintiff was broken about an inch from the end, and outside of the trapezoid ligament, what would be the effect on the collar bone as to maintaining its position?

A. There would be a deformity. Such a fracture would be outside the ligament and would be accompanied by a deformity.

Q. Would it be something that would remain permanent?

A. I mean a deviation from the natural outline of the bone; an abnormal, unnatural appearance, and displacement of fragments. There would be a salient angle there produced by the prominence of the one fragment. The outer would drop a little by reason of the reduction of the scapula, parting these fragments, and something would be due to the covering of the muscles. The weight of the shoulder would be sufficient to produce deformity. Now, where fracture occurs between these two ligaments, there is no displacement. (Refers to the portion of skeleton.) These tissues are inelastic. They will tear but not stretch: they are as inelastic as any yielding substance can be. There is another kind of fibrous tissue called the yellow; that is elastic, but it is not about joints. Nature is not so weak as to put elastic ligaments around joints.

73 Q. With such a fracture as you have described, if it had been made in March, 1872, would there be any traces of it visible now outside the trapezoid ligament?

A. Yes, there would be traces of it.

Q. What indications would there be?

A. Unevenness and enlargement. A ridge that would indicate the fracture. There is but one fracture of the clavicle that there is no displacement. There was never a fracture of it united without deformity. It arises from the perfect mobility of the shoulder.

Q. State whether you examined the plaintiff yesterday with reference to this fracture claimed of the left collar-bone.

A. Yes, I did.

Q. What did you find in the way of evidence of fracture?

Q. I found no evidence of fracture or of there having been any fracture of that bone.

Q. If there had been any fracture of that bone outside the trapezoid ligament, in March, 1872, could you have found evidences of it in your examination yesterday?

A. I should have expected to.

Q. Can you state from your examination yesterday whether the left clavicle of the plaintiff is in its normal condition?

A. Perfectly normal.

Q. Is there any twisted appearance about it?

A. No one can tell the two apart. Not the slightest variation. Both are natural, both normal. I examined carefully.

Q. Are you able to state from your examination of yesterday whether there ever has been fracture of the left clavicle?

A. Yes, sir; there never has been a fracture. I have good authority on that subject, and will read it. (The witness reads from the work of "Smith on Fractures and Dislocations," page 210; also on page 217.)

Q. Now, in the examination yesterday, did D'r Johnson point out on the shoulder of the plaintiff the point of the fracture?

A. Yes, sir.

74 Q. How far did he point out from the scapula end of the collar the fracture to have taken place?

A. Not to exceed one-half an inch.

Q. Suppose the fracture to have taken place at the point that D'r Johnson said and showed you that it did take place, what would be the condition of the collar-bone now as to your being able to discover evidence of fracture?

A. I should expect to find some difference between the injured one and the other one; the injured one shorter, with a little deformity. I want to say it was described yesterday as being an oblique fracture, so I say the bone would be shorter. I want to put myself in the position that we are talking about an oblique fracture.

Q. What would be the effect on the sternum and of the clavicle by such a fracture, and at the point where D'r Johnson showed you yesterday?

A. It would be higher and posterior. The inner fragment would be upward and backward, because the shoulder drops downward and forward. The clavicle is a prop or support, and these clavicles are just props or braces, and when the clavicle is broken the shoulder drops forward.

Q. What effect would such a fracture as the plaintiff has, or as claimed to have had at the point shown by D'r Johnson yesterday, have upon the nerves leading to the arm?

A. No effect at all.

Q. Explain to the jury why not.

A. Because the fracture is at a remote distance from the nerves of the clavicle which supply the arm. (The witness illustrates by the anatomical plates the nerves of the cervical plexus.)

Q. About what part of the clavicle do these nerves pass under; how far from the collar-bone?

A. About near the center of the collar-bone.

Q. Now, suppose this collar-bone was fractured one-half an inch or one inch from the scapular end and the fragment driven back half an inch, would it have any effect upon these nerves?

A. No, sir.

Q. Can the fracture of the clavicle outside the trapezoid ligament occur, with the fragment driven backward half an inch, without

75 tearing up the trapezoid ligament and its attachments to the clavicle?

A. I should expect this ligament would yield.

Q. If they had what would you expect to find now?

A. Some indications that fracture had existed. Some deformity.

Q. Would that be inevitable or only probable?

A. A probability almost amounting to its being inevitable. My opinion is in reference to the character of the injuries as set forth and their

treatment. He could not put on the dressing and maintain it there, without giving the patient great pain, because that form of dressing, called "Fox's Dressing," would put it in antagonism with the other. The character of dressing that the physician applied would have an injurious effect on the coracoid process, because in that dressing—Fox's Dressing—the arm is brought back thus—back of the body. Now, I saw this patient yesterday without any deformity, either of the clavicle or the coracoid process. Hence, I am forced to the conclusion that there was no fracture of either.

Q. Is there any abnormal condition of the shoulder joint in any respect disclosed in your examination yesterday?

A. None that I could detect. I speak with reference to deformity by fracture; but that is hardly a fair answer. There is an abnormal condition of the shoulder joint, but it has no reference to the appearance of the shoulder or any probabilities or possibilities of fracture, but to a long-continued disuse of the arm indicated by a little muscular rigidity, upon attempting to use the bone, which may be voluntary or involuntary, but which cannot be determined by a surgeon without the use of an anæsthetic.

Q. Is there any evidence visible to you as a surgeon, from your examination yesterday, that would make it impossible or difficult for the plaintiff to use his shoulder joint if he desired to do so?

A. No, sir; there is not.

Q. State whether you attempted to move his arm.

A. I made moderate efforts. I volunteered to make the examination without giving the patient any pain, and in my attempting to move the arm the patient complained and I desisted; but the effort that I made to move the arm developed this muscular resistance, either voluntary or involuntary, and I remarked then, the only way that a surgeon could determine was to put him under the effect of chloroform or some other anæsthetic.

76 Q. Suppose he was placed under the influence of chloroform, could it then be determined whether the resistance was voluntary or involuntary?

A. If I could put that patient under the effect of cloroform, I could then tell if there was any existence of false anphylosis.

(Defendant's attorneys make an offer to the plaintiff to have him placed under the influence of chloroform and an examination made before the jury. The plaintiff declines the offer.)

Q. Doctor, you may state whether in your examination yesterday of the plaintiff, he made any statements to you with reference to his wounds received in the army, and with reference to epilepsy, and state what he said?

A. He said he had received a severe wound of the head, on the right of the head, the upper corner of the forehead, you may say, where the hair is parted, and that injury was so severe as to produce unconsciousness. I should say he was unconscious several weeks and for many more weeks was unable to move, and that ever since he had been subject to dizziness of head, falling fits. He said nothing about epilepsy. That is the term of a technical character that I suppose medical men would apply to attacks of this character. He stated to me that he consulted D'r Brainard for this, and that D'r Brainard advised him to submit to the operation of trepanning, which is an operation in simple cases *is* resorted to as a cure of epilepsy. There could have been no other indication for the use of trepanning, as I see, before, except as a cure for epilepsy. D'r Johnson asked him if he had had any of these

fits since his injury. He said he had had two or three; that they were occurring less frequently, but that he had had them since.

Q. Did you hear the statement of D'r Johnson in regard to the expectoration of blood and mucus after the alleged injury in March, 1872, continuing for some two or three weeks from the first attack of it?

A. I am familiar with this statement. I heard it from D'r Johnson. I heard part of his testimony on the stand.

Q. Did you hear that part of it?

A. I heard part of D'r Johnson's testimony on the stand, and part of what was said in regard to his spitting blood, but that was in connection with the attack of pneumonia, in October, eight months after the injury.

77 Q. From your examination of the plaintiff yesterday, and from your opinion as to the extent of his injury claimed to have been received in March of 1872, and knowing of the injuries previously received in the head, as stated to you by the plaintiff, if you should find the plaintiff spitting blood during the month of April, 1872, for two or three weeks in slight quantities mixed with mucus, to what would you attribute it? I ought to state in addition that the patient said pieces of bone passed from his nose.

A. In answer to your question I would say that it is much more reasonable to suppose that the escape of blood is due to the condition set up by the would of the head than it is to suppose it came from the injury of the March before.

Q. How could that come from the head and be coughed up?

A. Secretions from the posterior nares or back part of the nose, when the patient is sleeping in the common posture, flow down into the throat and accumulate there in such quantities as to cause a cough, and the patient wakes up with this expectoration, and so during the day it produces by this same process the flowing, and there is a cough by mechanical irritation.

Q. Is it any evidence, then, that because it was coughed up it came from the lungs?

A. No, sir.

Q. What effect would a violent scuffle and considerable excitement on the part of plaintiff in the condition he then was, and particularly the trouble in his head, have upon him?

A. I should think it would produce great excitement, and if the patient is subject to epilepsy it might provoke an attack. It would provoke physical and mental excitement.

Q. What effect would the excitement have upon the wound in his head?

A. It might have a grave effect. The exercise might provoke that dizziness and giddiness, and from the effort some of the movements of the mind might provoke epilepsy if the patient is subject to it.

Q. Suppose the plaintiff received an injury on the 22nd of March, 1872, upon his chest which caused temporary inflammation of the lungs, from which he recovered so as to be able to continue at his ordinary duties of traveling and selling goods, and that afterwards in the following October he should be attacked with pneumonia, involving the lower two-thirds of the lungs over which he received the injury, and it

78 was known to you also that the plaintiff had had, previous to the injury, pneumonia, or inflammation of the lung, could you determine under such circumstances whether the pneumonia in October was the direct result of the injuries received the previous March?

A. Not if he had had an attack of pneumonia before the injury.

Q. Pneumonia, as I understand it, was supposed to correspond to the third and fourth ribs, and in October the pneumonia was of the lower two-thirds of lung?

A. No, sir.

Q. Is there any possible or probable connection between the injury in March and the pneumonia in October?

A. No, sir; pneumonia did not affect the same portion of the lung. It might just as well have been the other lung.

Q. Did you examine the plaintiff's lung yesterday?

A. Very carefully. All parts of each of them.

Q. Tell the jury how you found them?

A. I found them perfectly sound, as good a pair of lungs as any man has got in this room. I wish mine were as good. The evidences of soundness are, on stripping him of his shirt I found he had a well-developed chest; it is symmetrical; both sides alike, no sinking in under the collar bone; no abnormal formation; a standard of a good model of a good chest, and upon inspection when instructed to take a long breath, the breast expanded evenly and fully and as evenly contracted when the air was expelled, showing that there was no difference in the two lungs, and that no portion of the lungs is defective. There are other signs to be relied upon—that is by placing the hand on the chest and instructing the patient to count. The sensation is like that of stroking the back of a cat. I found the whole operation was influenced by respiration. Then there is another way—that is by percussion. Now you can tell by rapping on the wall when you come to a stud; so we can percuss the chest and can tell whether the lung is inflated with air or whether it is useless. There was no variation under percussion. D'r Johnson found dullness upon percussion, but that was in the region of the heart. That is always so. The evidences are markable also by listening. I heard the respiratory murmur of a perfectly healthy character. So I am forced to the conclusion that his lungs are perfectly sound. Those signs are called physical signs—these signs in contradistinction to other signs which are called rational signs, which are of a general character. The physical signs are unmistakable, and
79 a man that is up to his business can tell with as much certainty as he may desire, the presence or absence of pneumonia. The signs of auscultation and percussion are as near exact as anything can be in medicine, and no man has a right to be excused who can't tell a case of pneumonia, pleurisy, or consumption. He is not fit to practice his profession.

Q. Was the conversation with D'r Johnson in the presence of the plaintiff?

A. Yes, sir; after the examination had been made of all, embracing the principal facts, I said to D'r Johnson that there need be no variation of testimony with regular surgeons, so far as the lung was concerned, for if this patient had anything the matter with his lungs, we, as medical men, might agree upon the nature of it. I asked him to indicate that portion he thought was affected, and asked him when he examined him last and found this condition. I think he said last Saturday he examined him casually with his clothes on, but he indicated again as the location of this solidity the anterior portion of the left chest, which corresponds to the region of the heart.

Q. What examination did you make of the plaintiff's arm with reference to determining whether paralysis now exists?

A. My examination of the arm was by inspection by the eye and by

feeling with the finger, and by asking the patient to make such voluntary motion as he seemed to be capable and willing to do. I found no indications of paralysis.

Q. What difference, if any, did you find in the size or volume of the muscles of his arm?

A. I made no measurements. The variation was not appreciable to the eye. So I cannot tell. I saw none but what would be perfectly compatible with the disuse of the arm. The left arm is naturally small. There was no unnatural deviation in the size. Both appeared to be good arms, as far as size was concerned.

Q. Suppose the plaintiff had injured the shoulder in March, 1872, which required him to carry his arm in a sling and not use it for two or three months, what would be the effect of such disuse upon the shoulder joint?

A. Stiffening of the joint.

Q. To what extent?

A. That varies in different individuals. I have a patient that I treated in July and August, for fracture of the leg, who has a stiffened knee yet. This placing of the joint, at least in a healthy indi-
80 vidual, involves stiffening of the joint, that is a condition which is called false anchylosis technically, in contradistinction to genuine anchylosis, which is bony stiffening. We have the joint become immovable from two causes. The knitting of the bones together and making them stiff, and there is a false stiffening which comes from the thickening of these ligaments about the joint. They become thick. (Witness exhibits bones again.) If the patient has a little rheumatism it will grow up, and growing a little it wants a little more synovial fluid, and there comes to be a deposit, so that we sometimes have stiffening of joint from rheumatism. So, too, from disuse and false anchylosis.

Q. Can this false anchylosis as a result of injury be removed?

A. The treatment of false anchylosis is motion. We always tell them to use the limb, but sometimes it pained him so much that he refuses to do it, but it is the duty of the physician to insist upon it, for the limb will become stiff.

Q. How long does it take to complete a cure?

A. Sometimes months. I have in my mind a boy who came to me last winter with a stiff elbow, which was the result of an injury producing false anchylosis. The elbow was absolutely immovable. There was not a variation of half an inch, so that I could not tell whether there was any movement or not. That was a case where the joint was completely immovable by the little patient, but by placing him under the influence of chloroform, and then by breaking up that condition to that degree that it was movable by me, that passive motion was kept up a long time by myself, and the exercise of the arm of the patient was kept up by the patient sawing wood, and a cure produced.

Q. Could you determine from your examination yesterday, whether any false anchylosis has taken place in the patient's shoulder?

A. No, sir; not altogether. I could not tell from my examination whether it was or not. I am inclined to the opinion that it was.

Q. Would there be any difficulty if he used that arm in recovering complete use of it, in your judgment?

A. Not if it is a case of false anchylosis.

Q. Is there anything else that can prevent the use of it except false anchylosis from your examination of it?

A. I think not. That is my opinion.

Q. Does the science of surgery permit of demonstrating, where the shoulder is in a normal condition, that it can be used where there is no inflammation, nothing abnormal about it?

81 A. Certainly. I could place the patient under the influence of anæsthetics and take away the voluntary resistance. The fear of being hurt will produce resistance quite as readily as can be done by voluntary effort. It is voluntary just the same.

Q. Can you tell from your examination yesterday, whether the immovability of the shoulder joint was due to his volition or to an actual stiffness?

A. No, not exactly. In science it is voluntary of course.

Q. I mean designed purposely?

A. I would not like to say. I think the patient made more than was necessary, for I saw subsequently that he used the arm more than he would allow me to do it. In putting on his overcoat afterwards he used it with more freedom. You can draw your own inferences.

Q. Doctor, suppose an injury was received by a fracture of the third and fourth ribs on the left side, and the rib lacerated the lung, but no skin was broken on the outside, nor was there any punctured or incised wound into the lung from the outside, state what would follow in regard to the escape of air from the lung, and what physical signs would be present.

A. Unless you have a wound through the pleura there would be no escape of air. You can have no escape of air in any way without the wounding of the pleura. Fracture of the ribs producing laceration of the lungs is an exceedingly painful injury. The physical sign is confined to the escape of air. The escape of air would be one of the conditions of both emphysema and pneumarthrosis. I understood here yesterday that this emphysema lasted for several weeks and months—this escape of air. A wound of the rib producing emphysema is produced by a fragment of the rib being thrust inward on to the lung, wounding the pleura and the lung. If my closed fist was to represent the lung, the pleura might be represented by my handkerchief. (The witness demonstrates with the handkerchief.) Now if there is no wound in the skin the air cannot escape into the external world but must pass into the body. It is only limited to the size of the body. I have in my mind a case where the whole body was all puffed up and bloated out, just as you have seen a butcher take a quill and blow up meat. Then this other condition of pneumarthrosis is where the air escapes into the chest, and then the air displaces the lung and then the chest is as empty as an empty barrel would be, and the two conditions are most generally associated together. This air in the chest of course puts one lung

82 into disuse, and respiration is conducted by the other lung, and makes it exceedingly difficult for the patient to get his breath. Sometimes this condition is so severe as to require tapping in order to let the air escape. The signs of this condition are unmistakable, but I have seen a condition of pneumarthrosis that so closely resembles this condition, emphysema, that to a casual observer it would be confounded with it. Within the last ten days I had an occasion to observe that same condition. The signs of hemorrhage, spitting of blood, would not indicate a fracture of the rib and wounding of the lung. It would be the least reliable sign of either fracture of the rib or wounding of the lung.

Cross-examination:

Q. Doctor, these medical works you have referred to and which are

authorities in medicine and surgery, as I understand it, contain reports of cases that have come under the observation of persons versed in surgery, and from these reports these works are written?

A. I suppose that these books are written from the opinions of men whose surgical and medical experience and observation enable them to give their opinion with certainty.

Q. You say they are given from observation.

A. The whole is from the experience and observation if not of the writer, of men whose experience has been such as to entitle them to be considered authorities.

Q. Is it not frequent that there are new cases that are added by way of illustration?

A. It is not infrequent that new cases are given by way of illustration of facts.

Q. I understand you to say you reside in Chicago?

A. Yes, sir.

Q. Are you in any manner employed by the Chicago & Northwestern Railway Company?

A. Yes, sir.

Q. In what capacity?

A. As surgeon and physician for the company.

Q. You came out here for the purpose of being a witness in this case?

A. Yes, sir.

83 Q. You made no other examination of the plaintiff in this case except the one of yesterday?

A. No, sir; that is all.

Testimony of Dr. H. Ristine.

I reside in this county; am a physician and surgeon; have been in the practice 30 years, all of the time in this county. I am not acquainted with the plaintiff in this suit other than what I saw of him yesterday.

Statement of case to witness.

(See statement of case in D'r Isham's testimony above.)

From the foregoing statement of facts you are requested to give your professional opinion upon the following questions:

Q. Is it possible or probable that the plaintiff cou'd have carried two carpet sacks and could have put on his overcoat alone two hours after such an injury? and give your reasons.

A. I think it would be impossible for him to receive such an injury and walk and carry a carpet-sack in each hand, even a carpet-sack of any size.

Q. Is it possible or probable, with the injuries before described, that he could have been about the streets apparently attending to his ordinary affairs for two days and a half after receiving the injuries, and without their having been dressed or attended to by a surgeon, voluntarially?

A. I think not, sir; neither possible, or probable at least.

Q. Is it possible or probable that the injuries described could have been produced by blows from the fist of a brakeman under the circumstances disclosed by the foregoing statement of facts? and state your reasons for the opinion you may have.

A. I think it would be almost impossible for a man to have received such injury from the fist of a man, from the fact that there is a great

deal of elasticity about such joint, and from a blow received in that region it yields very readily. Being attached to the back only by muscles, rendering it very elastic, it would require a very severe blow to break the process, even if it was fixed, to break the coracoid process and clavicle at the same time, and it is very seldom received, except by a crushing force.

Q. In your judgment could a blow from the fist of a person fracture the clavicle and coracoid process at the same time, and with
84 the same blow, even if the back of the shoulder was against a solid substance?

A. I think not.

Q. If such an injury should be received with the clavicle fixed stationery against a solid substance, would you expect to find some injury of the spine or scapula?

A. If the force is sufficient to break the coracoid process and scapula both, I should expect to see some marks of violence posteriorly; bruising at least.

Q. Suppose a blow of sufficient force to fracture the clavicle and coracoid process in its outer fourth, within a one-half inch or an inch of the outer fourth, had been received on Friday night, and the surgeon saw it for the first time about Monday noon, would it be possible or probable that he could make a diagnosis and determine if there was a fracture of the coracoid process at that time?

A. I think not. It would be very difficult under such circumstances. It would be almost impossible to do it with certainty.

Q. What is the proper position of the arm, provided there has been a fracture of the coracoid process, in order to effect a union of it?

A. The arm should be placed in some position so as to keep it at rest.

Q. Should it be turned backward and upward or forward?

A. It should be kept in the natural position, and kept quiet as far as possible.

Q. If there had been a fracture of the clavicle within an inch of the scapular end of the coracoid process also, could you expect a union of both of them without deformity of either bone?

A. I think not.

Q. Suppose the fracture of the clavicle to have taken place outside the trapezoid ligament, and within three-fourths of an inch of the scapular end, and at the same time drive the fragment back at the point of fracture one-half inch from their normal position, what evidence would you expect to find of such fracture at this time?

A. I would expect to find a little enlargement at the point of fracture. It is almost always the case in any fracture at any point.

Q. If such a fracture as supposed in the last question had taken place, and the fracture was an oblique one, what would have been the
85 appearance and position of the fragments within a day or two afterwards when first examined by a surgeon?

A. The probability is the fragment would be in the same condition.

Q. Would there be any tilting up or down of the fragment of the clavicle?

A. The fragment would be separated more or less.

Q. Would the sternum end of the clavicle be depressed by such a fracture?

A. No; it probably would be lifted. It would depend somewhat upon the extent of the fracture.

Q. Suppose it was a fracture of the clavicle and outside the trapezoid ligament?

A. There might be a very little and might not.

Q. What effect would such fracture have upon the nerves that lead to and supply the arm?

A. That would depend upon the direction the fragment was driven. If it was not driven downward, it would not produce pressure on these nerves.

Q. Suppose it was a direct blow from the front, and the fracture occurred in the manner I have supposed, would the clavicle press upon any nerves?

A. I think not, upon any important nerves, in that character of fracture.

Q. What nerves pass immediately under the clavicle to supply the arm?

A. The brachial plexus.

Q. How far below the lower edge of the clavicle is the brachial plexus of nerves situated?

A. I don't know precisely what the distance is. I suppose it would be probably three-fourths of an inch. I think so, but am not positive. You mean the direction of nerves, the distance it comes to the brachial plexus. Probably that far, but I am not positive.

Q. Now, if you should break the clavicle outside the trapezoid ligament about three-fourths of an inch from the scapular end and
86 drive it back half an inch, would it then press upon the brachial plexus of nerves?

A. I think not.

Q. Give the jury an idea of how great and how far it would require a blow about three-fourths of an inch from the scapular end of the clavicle to not only produce oblique fracture of the clavicle, but to separate the clavicle from the coracoid process and drive it back one-half an inch.

A. I could not say, but it would require a great deal of force.

Q. In your judgment could such a force be applied by the fist of a person and produce such an injury?

A. I think not.

Q. Could the same blow struck by a person produce a fracture of the coracoid process and also such fracture as has been supposed of the clavicle?

A. I think not.

Q. How rare are the cases of the fracture of the coracoid process extending into the glenoid cavity?

A. Very rare.

Q. Do you know of any recorded cases of that kind which did not produce death?

A. No, sir.

Q. When the left arm is raised somewhat in this position (nearly at right angles with the body) in a man of the size of Captain McKinley, how near is this bone to the coracoid process?

A. It is very near the bone. It would come very near the coracoid process.

Q. Suppose the blow to be delivered with sufficient force to produce a fracture of the coracoid process extending into the glenoid cavity, and in dressing it the arm was brought back so, and kept there, what effect would it have?

A. It would have the effect to produce deformity.

Q. Suppose the third and fourth ribs of plaintiff had been fractured, and that one of the ribs had gone through both pleuras of the lungs and lacerated the lungs, in your opinion, could the plaintiff have rode one and one-half hours in the cars, written down memoranda in
87 his book, put on his overcoat, and left the train and left the depot without any expression of complaining of pain and apparently without pain?

A. I think it altogether improbable that he could have done so.

Q. With such an injury as just described, is it either possible or probable that he could have been about during the next two or three days and not have suffered such pain as to have induced him to call a physician?

A. I think not certainly. I think he could not have gone around at all and transacted business.

Q. You may state the reasons?

A. Because it would have produced a great deal of inflammation of the covering of the lungs, attended with great pain.

Q. How would it affect his breathing?

A. His breathing would have been laborious, producing a great amount of pain in the lung in the region of the injury, and on any motion of the chest would be very painful.

Q. With such injury do you think it probable that he could have entered a buggy and rode about town next day?

A. It is not probable at all.

Q. Suppose such a fracture of the ribs had occurred, and that it had lacerated the lungs, what would have been the consequence in regard to spitting blood, and what would it have been, if any?

A. He would probably expectorate blood of a scarlet color.

Q. Suppose as a matter of fact that he expectorated some dark blood mixed with mucus and air but not in any considerable quantities for ten or fifteen days after this injury, would that be any evidence of fracture of the ribs driven into the lungs?

A. No more than inflammation of the lungs from other causes.

Q. Could such blood as described be accounted for by some external injury which did not produce fracture of the ribs?

A. Yes. It might result from injury to the lungs by a violent blow on the chest.

Q. Suppose there had been a fracture of the rib which punctured the lung into the muscles of the chest and there had been no breaking of the skin, nor any punctured or incised wound from the outside into the lung, what result would you expect to follow that?
88 A. I should expect the parts to become swollen and distended with air in the tissues of the muscles and it would produce crepitus.

Q. To what extent would it fill the muscles?

A. It would fill the muscles. It might extend even over the entire body.

Q. What would be the probable extent of this puffing up?

A. That would depend altogether on the amount of injury, the size of the opening, and how long it might remain open.

Q. Would you regard the mere puffy appearance of the parts only which seemed to have been injured as any evidence of fracture of the ribs which had been driven into the lungs, just simply covering the part injured?

A. No, sir. That in itself would not be sufficient without crepitus.

Q. Suppose the rib of plaintiff was fractured in March and that on

the next December no union had taken place of the bones of the rib fractured, would you expect a union after that?

A. I think it very doubtful. I do not think it would unite.

Q. Would you get a union of any kind?

A. I might have a ligamentous union. I could not expect a bony union after that length of time. I don't think there are any cases recorded after that time.

Q. About what length of time after the fracture has taken place in a rib, if there has been no bony union, do you expect there will be a union?

A. I think in the course of three months that there will be no union unless there was before.

Q. Suppose there was a bony union, can you always detect that at any time afterward?

A. I don't know whether we could in the rib or not. In such a man as Captain McKinley, I can't say positively. Where there is a ligamentous union the fracture is movable. I take it the part will not be held together as firmly as in a bony union.

Q. If there was such a ligamentous union in the rib of Captain McKinley, could you have detected it by an examination yesterday?

A. I think so. Yes, sir, I think I could have detected it.

89 Q. Did you make an examination of Captain McKinley yesterday with the other surgeons?

A. Yes, sir.

Q. State how you found his left clavicle?

A. Nothing unnatural about its appearance. I did not notice any twisted appearance near its scapular end. I could detect no evidence of there having been a fracture of the clavicle. It compared in length and position with the other clavicle.

Q. What examination did you make of the coracoid process?

A. I did not make any further examination than to ascertain if it was in its natural position. It is my opinion that it is in its normal position. I found no evidence of a fracture of this process.

Q. Would it be reasonable to expect, if there had been a fracture in March, 1872, that you would have found it yesterday?

A. If it had been kept in its position it is possible that I would not. If that and the clavicle both were fractured there would be some deformity, some unnatural appearance to the shoulder joint.

Q. Taking the whole shoulder joint together, what appearance does it indicate as to its being in its normal condition?

A. I could detect nothing but some slight rigidity upon attempting to move the arm. The cause of this rigidity of the muscles may have been disuse. In my judgment it is for want of the use of muscles, either from injury or design not to use them.

Q. Did you discover by your examination of the arm and shoulder any reason known to surgery why he cannot move his arm if he desired to?

A. I did not discover any.

Q. Does the science of surgery offer evidence sufficient to form a judgment whether a man can or cannot use the shoulder joint if he desires to?

A. I don't think there is any way to ascertain without using some means of allowing the handling of the joint.

Q. Suppose he was put under the influence of chloroform, what is your opinion of the mobility of the shoulder joint and his final ability to use his arm?

A. I should judge from the appearance of the arm and the condition

of the muscles that the arm could be moved very considerable.
90 There would be considerable mobility. I think if it was properly manipulated and handled he would recover the full use of it.

Q. What is the effect of non-use of the shoulder joint for one and one-half years?

A. The joint muscles become stiffened. The usual way of breaking up that stiffening after the arm has been confined necesssarily is by using motion.

Q. What evidence did you discover of paralysis in the arm upon examination yesterday?

A. I did not discover any evidence of paralysis.

Q. State whether there is anything in the appearance of the shoulder and the muscles of the arm of M'r McKinley that would either necessarily or probably indicate a permanent injury of the shoulder joint.

A. I could discover nothing from the appearance or condition.

Q. Did you examine his lungs?

A. Yes, sir. I think his lungs are in a healthy condition. I could find no evidence of consolidation.

Q. Did you hear the plaintiff's statement in regard to the injury to his head by a shell wound yesterday?

A. Yes, sir.

Q. From what you heard him state in regard to that shell wound could you account from that injury for the spitting of blood and mucus which occurred the next two or three weeks after this injury claimed to have been inflicted in March?

A. No, sir; not entirely.

Q. Suppose there had been purulent discharges of matter and blood from the nose, and pieces of bone had come out previous to this time, is it probable or reasonable that while in a recumbent position some of that matter should trickle down the bronchial tubes and be expectorated next day?

A. It would trickle down into the throat. Probably there might be some suppuration of a blood character. It might be coughed up.

Q. Suppose the plaintiff was injured on the left chest in March, 1872, in such a manner that it produced an injury to the left lung, by rea-
son of which he spit some blood mixed with mucus and air, dark
91 colored blood, for two or three weeks, and at the end of two or three weeks it ceased and he was apparently restored and he then went about his usual business until, say, the next October, at which time he was attacked with hemorrhage and pneumonia, which lasted for some time, and which was of a sufficiently severe character as to block up two-thirds of the left lung. Suppose, also, the patient prior to the injury in March had had pneumonia; under such circumstances could you determine, as a physician, whether the pneumonia which he had in October was the result of the injury which he had received in March?

A. I don't think I could decide positively.

Q. If the lung is injured by external violence upon the chest and afterwards becomes apparently sound, is there any reason to apprehend pneumonia?

A. No, sir; no more than in any other case.

Q. Suppose the plaintiff had received this shell wound in the side of the face as stated, is there any probability that such a wound would produce paralysis of any part of the system; does paralysis sometimes follow such injury?

A. Yes, sir. If the injury was on the right side, the paralysis would be likely to appear on the left side.

Q. State whether the injuries received by the plaintiff by this shell wound in the head and his army life would have any influence in rendering him more susceptible of having any disease.

A. It would not, probably, render him susceptible of having pneumonia. It might produce epilepsy.

Q. What effect would that have on his general health?

A. It would impair it.

Q. Is not any person whose general health is impaired more liable to disease than others?

A. Yes, sir.

Cross-examination:

It is difficult to detect a fracture of bone after considerable time has elapsed. It is almost impossible to detect it if it is deep-seated and considerable time has elapsed. The difficulty increases with the lapse of time. I never examined the plaintiff until yesterday.

92 Q. You spoke of having examined the arm of the plaintiff and having stated its condition and appearance; now, may there not be injuries in the bones, or connected with the bones of that arm that may not be determined during life; for instance, a fracture extending into the glenoid cavity?

A. Yes, sir. A fracture extending through the glenoid cavity cannot always be determined during life.

Q. You spoke of the wound in the plaintiff's head, and said that where there is a wound in the head and matter is formed and passes into the trachea, it will produce irritation.

A. Yes, sir; it will produce irritation, and the person will cough. If it passes in there in the night, he will cough then. He would not carry it in there until the next day, or for a number of hours. It would probably be mixed with mucus and air. If checked at once, probably not.

Q. When the party is about in the day-time, is it not likely to come out at once?

A. Yes, sir.

Q. It is not likely then to be mixed with air?

A. It might be.

Q. Would it retain that appearance of having air in it if it was coughed into a vessel?

A. I do not know.

Q. Would that matter thus expectorated resemble matter that was coughed from the lungs?

A. Not entirely.

Q. In regard to determining whether the pneumonia which the plaintiff suffered from in October was caused by the accident in March, or by a previous attack—suppose, for instance, that that previous attack had occurred some fifteen of sixteen years prior, or only a few months, would not that have a decided bearing in answering that question?

A. If it had occurred sixteen years previously, the lung would have been in a better condition than if it occurred only a few months previously. It is my opinion that if a man has had but one attack of pneumonia, he is no more liable to have a recurrence of it than if he never had had it, if he is entirely recovered from the first before the second attack.

93 Q. I will ask you if a party received a severe injury in March, to the chest, so as to cause a large expectoration of blood until the coming of warm weather, and then on the coming of cold weather the expectoration should return in a more violent form, accompanied

with pneumonia, can you say that the latter attack is not connected with the injury received in March, supposing there had been inflammation occasionally in the intermediate time?

A. If his lungs had remained diseased, why, he would be more susceptible. If his lungs had recovered, he would not.

Q. You said that a wound upon the side of the head might produce paralysis upon the opposite side of the party?

A. Yes, sir. That paralysis would be likely to extend to a considerable portion of the body. If the paralysis was only slight, it might not extend to the lower extremities. It might to the legs themselves, and might extend to the whole left side.

Q. I will ask you if you should find that the wound upon the side of the head was sufficiently great to produce epilepsy and paralysis, would you expect it to be confined to the arm?

A. The pressure might not produce paralysis at all, but if it did it might go to the lower extremities. If the pressure was only very slight, it might not extend to the lower extremities.

Q. If in healing a fracture of bone, for instance, the clavicle or coracoid process, is not the deposition that comes out and forms on the bone apt to be confined to the lower side?

A. I think not. It would depend upon the quantity. It may appear on either side. I think there are no cases where it may be confined to the lower side.

I never attended a case of fracture of the coracoid process. I never saw a man stand up with his back upon a hard substance and another powerful man strike him upon the shoulder, or anywhere else, with all his force. Never was struck that way myself. Think I never saw a powerful man strike against the ribs of another. Am not in the employ of defendant, but do some practicing for them. I live in Cedar Rapids. Have not at any time stated that the left shoulder of plaintiff exhibited a prostrated appearance. I stated here that there was some atrophy; some slight wasting.

Redirect examination:

If that arm had not been used for over a year, that would account for all the wasting I saw.

94 Q. You say in answer to M'r Shiras that if any bloody matter trickled down into the bronchial tubes in the night, he would cough it up, and would not carry it until morning. Could such matter be held in the throat until morning and then coughed up?

A. Yes, sir.

I have no appointment as surgeon for the Chicago & Northwestern Railway Company. Have no pass over the road. I have no connection with the road, and have never been called to treat a person injured by said road.

Testimony of D'r E. L. Mansfield.

I reside in Linn County; am a physician and surgeon, and have been since 1845; am now in my 26th year in this county. I have no acquaintance with plaintiff, and never saw him until my examination of him yesterday.

Statement of case to witness.

(See statement of case in D'r Isham's testimony above.)

From the foregoing statement of facts you are requested to give your professional opinion upon the following questions:

Q. Is it possible or probable that the plaintiff could have carried two carpet sacks, and could have put on his overcoat alone, two hours after such injury? and give your reasons.

A. I do not think with such injuries he could have carried a carpet sack in the left hand, and he would have suffered great pain, and in my opinion would have been unable to put on an overcoat.

Q. Is it possible or probable, with the injuries before described, that he could have been about the streets, apparently attending to his ordinary affairs, for two days and a half after receiving the injuries, and without their having been dressed or attended to by a physician, voluntarily?

A. I do not think it is probable and hardly possible for a man to have lifted his arm with those injuries within three days, because inflammation must run high after such injuries.

Q. Is it possible or probable that the injuries described could have been produced by blows from the fist of a brakeman under the circumstances disclosed by the foregoing statement of facts? and state your reasons for the opinion you may give.

A. I do not think it is possible to receive such injuries from the blows of a man's fist, through clothing, because, 1st. The coracoid
95 process in a person of medium flesh is completely covered by muscles, so that it would be hard to reach it; and, 2d. The shoulder has no bony connection with the body except the clavicle, and from any blow upon the shoulder the shoulder slides around readily. It is so completely movable that I do not think that wound could be inflicted by a blow of the fist.

Q. Could the injury to the coracoid process and clavicle have been produced by any blows delivered between the left nipple and lower edge of the clavicle and not reaching the clavicle, by a man's fist or anything else?

A. It might, if it goes very near the clavicle, break the coracoid process if a very severe blow, but not without touching the clavicle, I think.

Q. When the arm is extended at nearly right angles to the body and a blow is struck immediately over the coracoid process with sufficient force to crush it, what would happen to the shoulder joint?

A. I would think that the shoulder joint would sustain a severe injury with the process.

Q. Is it possible, in your judgment, that a single blow from the fist of any person should fracture the coracoid process, extending into the glenoid cavity and at the same time produce an oblique fracture of the clavicle, within three-fourths of an inch of the scapular end, and break up the attachment of the clavicle by the trapezoid ligament, and pushing the fragments back half an inch?

A. I think not.

Q. What would be likely to be the result of a blow that should produce these injuries described?

A. I should consider them very grave and have great apprehension of their proving fatal.

Q. Suppose a fracture of the clavicle outside the trapezoid ligament to take place, and the fragments to be driven back one-half an inch, what effect would that have upon the nerves supplying the arm?

A. I cannot say that it would have any direct effect upon it because

it does not lay there. It lays further forward from the acromial articulation.

Q. How deep does it lie?

A. I think about three-fourths of an inch, or about one inch from the clavicle, and if the clavicle only went back one-half an inch it would not fetch it in contact with it.

96 Q. You may point out upon that plate, if you please, where the nerve lies that goes from the arm-pit and supplies the arm.

(The witness does as desired.)

Q. Suppose it did go back one-half an inch, and within two or three days the bone was got back to its normal condition, what lasting effect would that have on the nerve provided it had pressed upon the nerves?

A. It might have a lasting effect. It might be a lifetime without recovering.

Q. Suppose there should be a fracture of the clavicle outside the trapezoid ligament, and the fragment driven back one half an inch, what effect must it have upon the trapezoid ligament?

A. It would break it.

Q. In such an event what would be the result of the injury? Would it produce a deformity in the bone that you could detect it after it had recovered?

A. I think that the bone lying so near the surface it could be detected, I think, any time during life.

Q. Now, if there was a fracture of that kind outside the trapezoid ligament, and the ligament was not broken from the clavicle, then state if the fragment between the sternum and the point of injury would remain in its normal condition.

A. It would remain except the shoulder should slide forward.

Q. What would be the position of the fragment next to the scapula?

A. That end would be cast downward and backward so as to leave the appearance of the other sticking up.

Q. When the arm is raised at right-angles to the body, nearly, how close is the coracoid process to the head of the humerus?

A. I think probably one-half an inch.

Q. In your practice have you ever known of the fracture of the coracoid process?

A. No, sir; I think they are exceedingly rare. There are cases recorded where there have been bony and ligamentous unions. I have no recollection of such cases where the fracture extended into the glenoid cavity. There may be such, but I do not remember them now.

97 Q. Did you examine the plaintiff yesterday in connection with other surgeons?

A. I did.

Q. State whether D'r Johnson pointed out to you on M'r McKinley's collar-bone the place where he said the fracture took place.

A. He did, sir; he marked the place about one-half an inch from the acromial articulation. That is outside the trapezoid ligament.

Q. Did you examine for evidences of fracture?

A. I did. I found no evidence of fracture.

Q. State whether there was any twisting of the scapular end of the clavicle.

A. I consider it perfectly normal.

Q. If there had been such a fracture of the clavicle as described to you, would there be now remaining evidences of it?

A. I think so.

Q. State what examination you made of the caracoid process of plaintiff, and how you found it.

A. I merely felt for it, and I detected nothing unnatural.

Q. If a fracture of the clavicle had occurred, and also of the coracoid process, as heretofore stated, could there have been a complete recovery without leaving any trace of deformity of either bone?

A. It is not probable that there would be.

Q. Suppose a blow had been delivered upon the coracoid process and clavicle of the plaintiff, while the shoulder was in a fixed position against some solid substance, of sufficient force to have fractured the coracoid process extending into the glenoid cavity and the clavicle within one-half an inch of its scapular end, and breaking up the trapezoid ligament and pushing the fragments back one-half an inch, under such circumstances, what would you expect to find upon the back side or spine of the scapular or shoulder?

A. I would expect to find more or less signs of contusion.

Q. What would have been the probability of breaking the spine of the scapula also?

98 A. It would have been very probable, and in that event I would have expected death.

Q. Is it possible to produce such injuries as these by the fist of a person, under any circumstances?

A. I think not.

Q. State in what condition you found the shoulder-joint of plaintiff yesterday, taken as a whole. Was it natural and whole like the other, or was it deformed? State the difference, and the deformity, if there was any.

A. The shoulder-joint, externally, appeared natural around the head of the scapula and the humerus without moving it. When I came to move it, there appeared to be a rigidity of the muscles. There appeared to be something wrong about the ligaments of the shoulder. What it was I was unable to determine. I did not see anything like inflammation.

Q. To the eye of the surgeon, was there any visible reason why he could not move his arm if he had a will to do so?

A. No, sir; not to the eye. I measured both arms close to the body. I found five-eighths of an inch difference up next to the body. That could be accounted for by the disuse of the arm for a year or more. The rigidity of the muscles which I found I did not know the cause of.

Q. Could this rigidity of muscles have been produced by the will or design of the plaintiff himself?

A. I think it could have been; yes, sir.

Q. Now, if any shoulder-joint is in its natural position and apparently healthy, and there is no inflammation in it, what reason is there, surgically exhibited, to prevent his moving it?

A. We cannot see what might be in the ligament immediately at the joint. As was stated by the previous witness, there is frequently a rigidity of the ligaments where the limb is confined for a long time and kept in one position.

Q. Suppose I should tie up my left arm in a sling and keep it there without moving, what would be the result?

A. When you came to move it, you would find it stiff and a little sore.

Q. What treatment would you prescribe?

A. Moving it.

99 Q. Did you see anything upon examination of the plaintiff's shoulder to prevent his obtaining perfect use of it if he practiced using it?

A. I did not.

Q. Suppose you put him under the influence of chloroform and you then find that you can move the shoulder in all directions that it is proper for it to move?

A. I then would conclude that with proper motion he could get the use of it.

Q. Did your handling the arm produce any pain?

A. He complained that it hurt him.

Q. Do you know whether it produces pain or not?

A. No, sir; only what he told me. There was a resistance, either voluntary or involuntary, whenever I attempted to give it any motion, and the motion was very slight and the muscles were rigid and hard. It might have been voluntary or not; I could not tell.

Q. Are there rheumatic troubles that are likely to attack a joint that has become troubled by disease?

A. No, sir; unless he has had previous rheumatism.

Q. Did you make any examination of the plaintiff's lungs?

A. I did. I found his lungs healthy. There was no consolidation of any portion of his lungs. I applied my ear to his chest and had him first breathe and I listened. Then applied concussion. Then applied my ear to his chest and had him count. Then I had him stand in front of me and draw in a full inspiration, to see if there was a uniform inspiration.

Q. Suppose there was an attachment of the lung to the pleura, would that have prevented him from taking a long breath?

A. No, sir; I think not.

Q. Would it be likely to cause any pain in the lungs by taking a full breath?

A. It might.

Q. Did the plaintiff complain when he took a full breath?

A. He did not.

100 Q. From an examination of the coracoid process, and of the clavicle, and of the shoulder joint, and of the lungs, and of the ribs, can you state any physical signs of permanent injury to any of these parts?

A. No, sir; not to any of those that you have named.

Q. State whether you examined his third and fourth ribs on the left side.

A. I did not examine them very carefully. I found no evidences of fracture as far as my examination went.

Q. Suppose he had had a complete fracture of the rib about the 22d of March, and in the next December there had been no union of the rib, what in your opinion is the probability of there ever being a union after that?

A. My opinion is, that there would not have been a bony union after that. I calculate that if I do not get a bony union in four months I will not get a bony union without surgical interference. r

Q. If there had been no bony union in this case prior to Decembe after the injury in March, and afterwards a ligamentous union had taken place, could it have been detected by an examination of M'r McKinley yesterday?

A. I think it could have been discovered very easily.

Q. Did you make such an examination as to satisfy you that there was not a ligamentous union?

A. I did. I think there is no ligamentous union.

Q. Do you think it probable that a man should have emphysema or air escaping from the lungs six months after the fracture of a rib, and to require a compress at the end of that time?

A. I have never seen a case of that kind, and I hardly think it would be probable to last that long.

Q. Does an inflamed state of the muscles by outward injury over the chest have the puffy appearance of air escaping from the lungs except when there is some extravasation of blood?

A. When there is great contusion and extravasation of blood it will have that appearance over the surface so bruised and not extending beyond.

Q. Now, suppose there was air actually coming from the lungs, would the puffy appearance be confined simply to the points of contusion, or would it extend?

101 A. It might extend over a considerable surface. Frequently the longer it lasts the more surface it covers over.

Q. Did you hear the testimony of plaintiff as to the wound in his head?

A. I did.

Q. Did you hear the testimony of D'r Johnson in regard to his expectorating some blood and mucus for the first two or three weeks after he received his injury in March, 1872?

A. I heard what he said in his cross-examination.

Q. From all you know from the plaintiff's statement and from D'r Johnson's testimony as to his spitting blood the latter part of March and first of April, 1872, how do you account for it?

A. Well, that would be hard for me to say without seeing the expectoration. If the expectoration came from the lung it must have been intimately mixed with mucus. If it came from the nose and was lodged in the nose for some time it would not be mixed much with mucus.

Q. Suppose it came from a wound in the head?

A. Associated with a wound it would not be mingled with mucus. Take blood where it comes from the lung, and it is so intimately mingled with mucus that you can scarcely see the point of difference.

Q. What is the color of it coming from the lungs and resulting from inflammation?

A. It is a scarlet red. I presume it might be of a dark color if it lay in the bronchial tubes before expectoration.

Q. This spitting of blood as described by D'r Johnson as being dark colored, could you account for it as being a result from injury to the person, and as belonging to the chest?

A. In no way except by its laying in the bronchial tubes some time and assuming a dark appearance.

Q. Did you hear the testimony of D'r Johnson as to the attack of pneumonia in October of last year?

A. Yes, sir.

Q. In your opinion was that attack of pneumonia in October a result of the injuries that he received the preceding March, on the outside of the chest?

A. That I could not say positively. My opinion would be qualified in that respect. My experience shows me that when a person once has pneumonia they are more likely to have it again. If they had perfectly recovered I don't think they would be, but if there had been traces

102 of it left during the summer there might be a connection between the attack in October and the injury in March. There are two kinds of pneumonia, the idiomatic and the idiopathic pneumonia. If this is of the idiomatic form arising from the wound, if perfectly recovered from the wound there would probably be no connection between that and the pneumonia in October, but if it had not perfectly recovered there might be.

Q. Suppose he had had previous to this injury idiomatic pneumonia and other diseases, and then had the same kind of pneumonia involving much more than he had in March, then could you say it would be more likely to refer to the injury in March or the previous attack of pneumonia?

A. I could say under those circumstances that it was constitutional, and probably arose from the previous attack and was idiopathic.

Cross-examination:

Q. In regard to this attack of pneumonia, suppose the previous attack of pneumonia had been quite a number of years previously and there had been no return of it for a long interval, would not that have a great weight with you in deciding as to this attack of pneumonia?

A. He is more liable in my opinion to have it. The more they have it the more they will have it.

Q. Suppose it is a case that when a person is a boy he has an attack of this pneumonia and a number of years elapses and he is injured and has pneumonia, would not the injury make him more liable to have pneumonia afterward?

A. An injury would have a tendency to aggravate this tendency to pneumonia.

Q. The examination you speak of having made was the one that was made yesterday during the adjournment after dinner?

A. Yes, sir.

Q. You examined the plaintiff as to his arm. Did he at that time exhibit evidences of pain?

A. Yes, sir; in the region of the shoulder joint and the articulation of the acromian process and coracoid process.

Q. I will ask you whether the statements that your patients make when you examine them is not the ordinary way in which you ascertain where the injury is?

A. Yes, sir.

Q. You stated that if there had been a fracture of the clavicle there would be evidences of it still existing?

A. I would have found a deformity.

103 Q. There are cases where there are not deformities, are there not?

A. Yes, sir.

Q. Did you look for a deformity?

A. Yes, sir; for a callous.

Q. In regard to the fracture of the clavicle and coracoid process, does not that lymph frequently form only on the under side?

A. I am not decided on this point. I think I have seen cases where it formed regularly, and not irregularly, around the joint.

Q. Might there not be some small amount on one side and considerable on the other?

A. That was my opinion when the question was propounded to D'r Ristine.

Q. If that was the case, then you could not detect that by merely examining the shoulder on the outside, by feeling with the finger?

A. No, sir.

Q. You spoke also of the puffy appearance that may come from a blow where the injury is received on the flesh, and there is inflammation and extravasation of blood, and that there might come a filling up of the tissues?

A. Yes, sir.

Q. How long would that last?

A. Not a great while. I would calculate that if it was not absorbed in the course of ten days it would have sup'uration.

Q. Would you not think if you should find that puffy appearance on the chest for a greater length of time that it was air come from the lungs?

A. I would think it atmosphere from some place.

Q. When it does come out under the skin in that way will not the quantity differ according to the wound?

A. Yes.

Q. If the wound hea'ed up rapidly there would not be a continued appearance of it, would there; and if it heals slowly, that appearance will continue until the wound is healed?

A. That is my opinion.

Q. I will ask you whether there is any influence on the space which it covers over, whether that depends on the condition of the person, if fleshy or otherwise, muscular or otherwise?

104 A. I think that would not have any influence. It passes along the cellular tissues.

Q. Is that tissue the same in all men?

A. No, sir. A spare man would be more distended than a fleshy one.

Q. In making the test you spoke of in examining his lungs yesterday, you used no instrument, did you?

A. No, sir; I prefer the ear.

Q. You spoke of Dr. Johnson's pointing out the position of the fracture of the clavicle. How did he point it out?

A. With his finger. He pointed it out twice, I think. I was standing within 2 or 3 feet of him at the time.

Q. I will ask you, if the shoulder is thrown back does it not bring the clavicle much nearer the brachial plexus?

A. Yes, sir.

Q. The position of the arm, in being extended, changes the relative position of the bones and the clavicle, does it not?

A. It changes the position of the clavicle and shoulder-joint generally, relative to the chest.

Q. Is it possible to fracture the clavicle by a blow from the fist?

A. I have never known such a case. My opinion is, that a heavy blow struck upon an unprotected part of the clavicle might break it.

Q. Do you know of any cases where, from the recoil of a gun, the clavicle was broken?

A. Not that I have heard of.

Q. How was it in the case of David Wales?

A. I have no knowledge of it.

Q. Is it not possible for the person himself to fracture the clavicle from strong muscular action of the party himself?

A. I do not recollect of reading of any of that character.

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A. I do not recollect of reading of any of that character.

Q. I will ask you if it is not more difficult to detect a fracture after

considerable time has elapsed, than it is within a short time after the fracture has occurred?

A. The longer the time the more the difficulty, of course.

Redirect examination:

Q. Suppose the injury is so severe on the chest that it produces a wound into the lung and the air escapes, and there is no union of the bone, and this air keeps on escaping for six months, state whether
105 under such circumstances the plaintiff could be traveling about the country and doing business?

A. I think not, sir. I think that where the air was escaping that way it would keep the pleural cavity so that he would find great shortness of breath. There would, in the first place, be acute inflammation, and when that wore off chronic inflammation would take place, and I do not think he would be moving about.

Recross-examination:

Q. Did you ever see a man try to do that under such circumstances?

A. No, sir.

Q. I will ask you if one person does not bear pain better than another?

A. Yes, sir.

Q. Do you not find very many whom it is very difficult to keep quiet; is not there a great difference in that respect among patients?

A. Yes, sir; a very great difference, of course.

Q. In regard to where there is a wound upon the side of the head, affecting the head and producing paralysis, I will ask you whether that is not likely to extend to and manifest itself on the whole side?

A. I cannot conceive how a wound of the head can paralyze without paralyzing the portion of the body on the opposite side. If the wound is in the left side the paralysis will be of the right side. I cannot see how the wound can be in the head and paralyze a part of the side without paralyzing the whole side.

Q. If it is over the brain it will paralyze the whole side?

A. I think so.

Q. I will ask you, in regard to the shrinkage of the arm, whether that shrinkage would necessarily follow disease?

A. That invariably will follow a difficulty of the nerve supplying the arm after a time.

Q. Did you measure the length of the arm of the plaintiff when you made the examination?

A. I did not, sir; I merely measured around the arm in two places.

Defendant rests.

And afterwards, on the 7th day of November, 1873, the plaintiff offered and introduced the following

106 *Rebutting testimony.*

Plaintiff's attorney reads in evidence from Frank H. Hamilton's work on fractures and dislocations, to wit: Under head of "Fractures," on pages 172 and 175; under head of "Fractures of the Clavicle," on pages 178, 182, and 186; and chapter treating of "Fracture of the Coracoid Process," on page 211, and continuing on to pages 212 and 213.

Testimony of Dr Johnson (recalled).

In your direct examination you spoke of the character of the dressing

that you applied when the plaintiff called upon you; what was the character of that dressing?

A. It was the Fox dressing. It was placed as it is here in Fox's dressing. (Refers to Hamilton's work, page 199.) There is a plate of it in this book. The arm was placed across the breast. I stated that there was a little modification of that dressing. The only difference was that I put on some adhesive strips instead of the bandages.

Q. Did you ever at any time have the arm brought back?

A. No, sir; I kept it placed across the front.

Q. Were you present at the time the examination was made of M'r McKinley at the hotel?

A. Yes, sir; it took place just after dinner.

Q. Did you point out the point of fracture?

A. did. I stated that it was about the coracoid process, and the description of the bone in relation to the coracoid process, that it would show it was about an inch from the coracoid process.

Q. The pointing out was done on the body of the plaintiff, was it?

A. Yes, sir.

Q. Where were these physicians standing at the time?

A. At different points. D'r Isham was not in front, but at my left; D'r Mansfield stood at the left of the patient at my right; and I do not remember where Ristine stood, but he was in the room, however.

Q. The point of fracture, I understand you to say, was within the trapezoid ligament?

A. Yes, sir.

Q. Did you point out the location of the point of dullness in the lungs?

107 A. Yes, sir. At a point about one and one-half inches above the outside of the left nipple.

Q. Did you indicate a point above the immediate region of the heart?

A. No, sir, of the lungs. (Witness refers to "Wood's Practice.")

Q. What work is that you are referring to?

A. Wood's Practice. It is a standard work, and has been so considered for a long time. (The witness exhibits plate of the heart and lungs and points out the point of dullness in the plaintiff's lungs. See Wood's Practice, page 127.)

Q. Had you been acquainted with M'r McKinley before March, 1872?

A. Yes, sir, about a year and a half. I did all the practice in his family so far as I know, during that time.

Q. What was the condition of the general health of plaintiff during that time and immediately preceding the accident and previous to that?

(Objected to by defendant because it is inadmissible as being new matter and should have been offered in the direct examination. The objection sustained and plaintiff excepts.)

Q. Now, doctor, you heard the testimony in regard to the discharges from the head of the plaintiff of purulent matter and so forth; now state to the jury whether you observed any effect upon the general health of the plaintiff resulting from these discharges and the wound in the head.

A. During the time previous to this injury I had but very little occasion to prescribe for Captain McKinley, and not for any of these things in his head, and I observed no bad results arising from them. He was absent a good deal of the time and would come back again. At one of these times he showed me some of the discharges that he had had from his head. These discharges did not compare at all with the discharge that he had subsequently to the accident. It was very slight with a

tinge of blood with it and some air in it, entirely different from anything I ever saw expectorated from the lungs.

Q. Before this time, had you ever seen any signs of paralysis of the left arm of plaintiff?

A. No, sir.

Q. I will ask you whether, in your opinion, blows sufficiently powerful can be given from the fist of a powerful man to produce a fracture of the coracoid process?

108 A. Not unless the shoulder blade is fixed. I think that there is evidence of the fracture of that process by a force that would not be greater than a good-sized man could exert.

Q. Have you known of fracture of the coracoid process by a blow administered in that way?

A. No, sir.

Q. I understand that this opinion you give is based only on the reported cases?

A. On the reported case and the estimation I give to the blow.

Q. What do you mean by the scapula being fixed?

A. Having some other support besides the ligaments. If a person is leaning against a post, that fixes it.

Testimony of S. J. McKinley. (*Recalled.*)

When the dressing was placed upon me by D'r Johnson, my arm was placed across my chest, and was not at any time brought back and placed against my body. I had two satchels when I left the car at Beloit and carried them both in my right hand. I have them here. (Exhibits them.) They are the only ones I have carried for years. My overcoat was a cape overcoat without sleeves and part cape on each side just to be thrown over the shoulder. I could put it on very easily with one hand. I could carry it when I had my arm in the sling and throw it over me very handily. After the accident had occurred and I was riding in the cars from Harvard to Beloit, I did not procure names and write them in a book. M'r Fletcher asked me if I had a book and I handed him a book I had in my side pocket and several gentlemen wrote their addresses in it. The names are in the handwriting of the persons writing their names. After he got done writing she asked me for the book, and wrote her name in it and handed it back to me. I did not get or write down the name of the brakeman. I asked for the name of the brakeman and it was given to me and I procured the initials some time after. I was familiar with the name. I also asked the conductor for his name. At the time of the scuffle I did not have on that overcoat. It was left in my seat.

The plaintiff desired to put in evidence certain parts of depositions that were ruled out in the testimony-in-chief on the ground that the proper foundation had not then been laid. (Objected to on the ground that it is not rebutting testimony and that the attention of M'r Lines, the conductor, was not called to these depositions, and because they were not called until after the plaintiff and defendant had rested their cases. Objection overruled and defendant excepts.)

109 The following portions of the depositions excluded from the testimony in chief were introduced in evidence by the plaintiff, to wit:

The latter clause of interrogatory 7, of the deposition of Ellen P. Fletcher.

(See deposition of Ellen P. Fletcher, page 7.)

The 8th interrogatory of deposition of Friend P. Fletcher.

(See deposition of Friend P. Fletcher, page 13.)

The 4th interrogatory of deposition of Charles F. Russell.

(See deposition of Charles F. Russell, page 17.)

The 5th interrogatory of deposition of Dana Sherrill as follows, to wit:

Int. 5. Did you or not hear a conversation between plaintiff and the conductor at the time or immediately after the difficulty? If yea, give said conversation and state if you know who were present at the time?

A. Immediately after the difficulty, I heard a conversation between the plaintiff and conductor in which the conductor threatened to have the plaintiff put out of the car. There was a Mr. Frost, a resident of Beloit, Wisconsin, present at the time, and there were several other parties present, but I do not recollect who they were.

The 14th interrogatory of deposition of James A. Chapman as follows, to wit:

Int. 14. If you know any other matter or thing of benefit or interest to the parties to this suit and pertinent to the issues in said suit, you will state the same as fully as though you were thereunto specially interrogated.

A. I now recollect that plaintiff said to the conductor that he had rode over the road for several years, and had never been refused entrance into this car coming from Harvard to Beloit, and that the conductor replied that, "If you say that you lie," or "You are a liar." I cannot tell which expression was used. There was only two passenger cars on that train, on the evening of March 22, 1872. I passed from the baggage car through the forward passenger car to the rear car. The forward passenger car was dimly lighted. Do not remember of seeing any passengers occupying that car. I think there were none in it. It was after the train started from Harvard that I passed through the front passenger car.

(This latter interrogatory as evidence objected to particularly on the ground that the deposition was not read at all in the testimony in chief, and cannot be introduced here.

Plaintiff rests.

110 And thereupon, the foregoing being all the evidence, after argument of counsel to the jury, the defendant asked the court to give to the jury the instructions in words and figures following, to wit:

Instructions asked by defendant.

1. A railroad company is not responsible for the criminal or wilful acts of its agents or servants. It is only answerable for their negligent and careless acts done or omitted in the course of the performance of their duties. Therefore, if you find from the testimony in this case, that the brakeman assaulted plaintiff and inflicted the injuries complained of, such acts are criminal and wilful, and plaintiff cannot recover in this action, unless it is shown that defendant authorized the act or approved of it afterward. There is no proof of any authority from defendant to assault or injure plaintiff and no ratification of the brakeman's act.

2. If at the time the plaintiff attempted to enter the car, the brakeman was upon the platform of the car and standing with his back to the door of the same, the plaintiff, although he might have been entitled to

enter the car, had no right to commit a breach of the peace, or to assault the brakeman for the purpose of entering the car, and if you find from the evidence that the plaintiff did assault the brakeman and the brakeman inflicted the injuries complained of, while in and about resisting such assault, the plaintiff cannot recover. The law does not tolerate the settling of disputes as to right and property by force. If the plaintiff had the right to enter the car, and he was refused admittance, the law furnishes a means of redress and compensation for such wrong and injury.

3. If the jury believe from the testimony, that when the plaintiff came upon the platform of the car to enter the same, the brakeman, Sweet, was standing at or in the door of the car and told the plaintiff he could not go in there; that the plaintiff thereupon tried to push his way in the car; that he did push his way into it and pushed the brakeman in ahead of him; that the brakeman struggled with him; that the plaintiff pushed the brakeman onto the floor of the car and held him there, and raised his foot and told him he could kick him, but did not, and let him go; then you are instructed that such acts on the part of the plaintiff, in pushing his way into the car and pushing the brakeman in ahead of him, were unauthorized and unlawful, and if he sustained the injuries complained of while engaged therein, then the defendant is not liable therefor.

4. If the jury believe from the evidence that at the time the plaintiff attempted to enter the car he found the brakeman, Sweet, standing at the door thereof, and the brakeman told the plaintiff he
111 could not go in there, and the plaintiff pushed his way into the car and pushed the brakeman in ahead of him and pushed him down on to the floor of the car, then you are instructed that such conduct on the part of the plaintiff was unlawful; and for any injury the plaintiff may have received from the brakeman while so engaged, the defendant is not liable.

5. If the jury believe from the evidence that when the plaintiff attempted to enter the car in question the brakeman was standing at the door of the car and refused to let the plaintiff into the same, and the plaintiff told the brakeman he would go in and attempted to push the brakeman away from the door, and did push his way in, then the plaintiff was the aggressor and the defendant would not be liable to him for any injury he may have sustained in attempting to push the brakeman away and push his way into said car.

6. If the jury believe from the evidence that, although the plaintiff might have been entitled to enter the car in question, yet if the brakeman stood at the door and refused him admission, the plaintiff had no right to use force and violence to effect an entrance.

7. If the brakeman stood at the door of the car and refused to permit the plaintiff to enter it, whether the plaintiff had the right to a seat therein or not, the plaintiff would not be justified in using force and violence to push the brakeman away and force his way into the car, and if he did use force and violence to effect an entrance, he was guilty of an assault upon him; and if he received the injuries complained of while engaged in such assault, the fault is his own and the defendant is not liable therefor.

8. Any language used by the conductor towards the plaintiff cannot constitute a cause of action, nor does it furnish any ground to increase the damages which may be given the plaintiff, if any. This testimony was admitted only because the brakeman was present and was a part of the original transaction in which plaintiff claims to have been injured.

The damages, if any, can only be given for bodily injuries received by plaintiff at the hands of the brakeman.

9. No damages can be given in this case for the mere use of insulting or abusive language used by the brakeman or conductor.

Which instructions the court refused to give as to each and every one of said instructions; to which refusal the defendant excepted at the time.

And on the 8th day of November the following

Stipulation

was made and filed:

112 It is agreed by the parties that neither party shall be required to state the reasons for exceptions to any instructions in the case, as seems to be contemplated by section 2789 of the Code, and that both parties shall have the same right to urge the exceptions as though the grounds were specially stated.

SHIRAS, VAN DUZEE & HENDERSON,
For Plaintiff.
E. S. BAILEY AND N. M. HUBBARD,
For Defendant.

And thereupon the court gave to the jury, on its own motion, the following instructions:

Instructions given by the court on its own motion.

GENTLEMEN OF THE JURY: The plaintiff claims in substance that on or about the 22nd day of March, 1872, he purchased of defendant, at Chicago, a ticket for Beloit, Wisconsin, in consideration of which the defendant agreed and became bound to safely convey the plaintiff from Chicago to Beloit over the railroad of defendant, and to have and use proper care with proper persons in charge thereof as conductors, engineers, and brakemen, and by means thereof to safely transport and convey plaintiff from Chicago to Beloit.

It is further alleged that the defendant did not furnish and have proper persons in charge of its cars and trains; that when the train of defendant reached Harvard Junction the plaintiff, by direction of the defendant, changed cars and went upon the train going from Harvard Junction to Beloit; that plaintiff went upon said train and selected a seat in a car going to Beloit; that before said train started the plaintiff passed out of the car for a necessary purpose and immediately returned thereto; that the brakeman of defendant in charge of said car, without any just cause therefor, refused to permit the plaintiff to enter and reoccupy his seat, and, upon plaintiff insisting upon his right so to do, defendant's brakeman, without any reason or justification therefor, assaulted plaintiff, and struck, bruised, and wounded him, breaking his collar-bone, fracturing his shoulder, breaking and injuring two or more of plaintiff's ribs, and otherwise greatly injuring plaintiff, in consequence whereof he has suffered great pain and is permanently disabled, both in health and bodily condition, and has been and still is hindered and prevented from transacting his necessary business, and has expended and paid out large sums of money, to wit, the sum of $1,000, in and about endeavoring to cure the said injuries. It is further alleged that the said brakeman and

other servants and employés of defendant did further abuse, in-
113 sult, and maltreat plaintiff by the use of abusive and threatening epithets and language, continuing the same after plaintiff had taken his seat in said car, and by laying violent hands upon plaintiff's person, and threatening to eject him from said car, thereby causing him great bodily and mental pain and distress; that by reason of the failure on the part of defendant to safely convey plaintiff from Chicago to Beloit, and through and by reason of the wrongs and injuries aforesaid, he has suffered damages in the sum of $20,000, for which he asks judgment.

The defendant answering denies each and every allegation of the petition generally and specifically.

And for further answer defendant says that its brakeman, one Sweet, without the authority or approval of the defendant inflicted the injuries complained of by plaintiff, if any, wilfully and maliciously, and not in the performance of his duty.

And for further answer the defendant says that plaintiff assaulted the brakeman of the defendant, and that while in and about resisting said assault the plaintiff received the injuries complained of, if at all.

2. It is admitted that the defendant is a common carrier, engaged in the business of transporting passengers for hire over its various lines of road, including the line from Chicago to Beloit. If you find from the evidence that the plaintiff in March, 1872, purchased a ticket from defendant, and went upon defendant's train of cars, for the purpose of being transported from Chicago to Beloit, then you are instructed that thereby the defendant assumed the duties and obligations of a common carrier of passengers and would be liable to plaintiff for any violation thereof which caused injury or damage to plaintiff without fault on his part. The duties and obligations of the parties are different from what they would be if the relation of carrier and passenger did not exist.

3. A railroad company has the right to make and enforce reasonable rules and regulations for the transportation of passengers. It has the right to seat the passengers in its train, and the reservation of a car for ladies or for ladies and gentlemen accompanying each other, is not an unreasonable regulation is enforced and carried out in a proper manner. If you find from the evidence in this case, that the defendant directed and instructed its brakeman not to allow gentlemen unaccompanied by ladies to take seats in the rear car when it could be done without trouble with them, and you further find that on this particular occasion the passengers, male and female, without distinction, were permitted with-
out objection to seat themselves in the rear car, and that plaint-
114 iff entered the car without objection and selected his seat and deposited his baggage in it, and went out, the brakeman had no right by reason of any rule or regulation of the company to stop him or attempt to prevent him from re-entering the car, especially if the plaintiff on attempting to re-enter informed the brakeman that his baggage was there.

4. Much has been said in the argument to the court as to the liability of the company for the alleged wrongful and criminal assault and battery by the brakeman. You are instructed that if the plaintiff attempted to re-enter the car and was without fault on his part as hereinafter explained, and the brakeman with the intent and purpose to prevent him from re-entering the car for the reason that it was not intended for gentlemen unaccompanied by ladies, violently assaulted and injured the plaintiff, and was guilty of a criminal act in so doing, the defendant is liable for such injury, and the fact, if so it is, that the

brakeman used such force and violence as to render himself criminally liable, does not exonerate the defendant. In other words, if the brakeman in executing what he supposed to be his orders, used force and violence, when his orders did not contemplate such means, the company is liable for such injuries as his violence occasions.

5. You will observe that the foregoing instruction is based on the hypothesis that the plaintiff was not in the wrong himself in what occurred upon the platform and at the door of the car. While it is true that the passenger has the right to kind and gentlemanly treatment from the employés of the railway company, it is also true that the employés are entitled to gentlemanly and fair treatment from the passengers. There is a conflict of evidence as to the acts of the parties to the disturbance, and you are to determine what are the actual facts from all the testimony. If, on the one hand, you find that the plaintiff was without fault as explained in instruction numbered four, the defendant is liable. If, on the other hand, you find from the evidence that the brakeman was standing at the door of the rear car when the plaintiff approached to re-enter, and the plaintiff, without any explanation, demanded that the brakeman should stand aside, and the brakeman requested him to enter the other car, and thereupon the plaintiff in a violent manner and without stating the facts as to his baggage, assaulted the brakeman by crowding or pushing or striking him, and the brakeman merely resisted such assault, and the plaintiff was in this manner injured, he cannot recover. He was the aggressor himself, and no man has the right to take advantage of his own wrong.

6. If, on the other hand, you find from the evidence that the brakeman was at the door when the plaintiff first entered the car, passed him in, or if you find that the plaintiff, when he attempted to re-enter, informed the brakeman that his baggage was in the car, and the brakeman when the plaintiff attempted to re-enter without any assault on the part of plaintiff, assaulted and struck the plaintiff, the defendant is liable.

7. If at the time the plaintiff attempted to re-enter the car, the brakeman was upon the platform of the car and standing with his back to the door of the same, the plaintiff, although he might have been entitled to enter the car, had no right to commit a breach of the peace, or assault the brakeman for the purpose of entering the car, and if you find from the evidence that the plaintiff did first assault the brakeman and the brakeman inflicted the injuries complained of while in and about resisting the assault of the plaintiff, the plaintiff cannot recover.

8. As to the question who was in fault, the burden of proof is upon the plaintiff, and unless he has sustained the issue by a preponderance or greater weight of testimony, he cannot recover.

9. If, in the light of the foregoing instructions, you find from the evidence that the plaintiff is entitled to recover, the next question is as to the measure of damages to which the plaintiff is entitled. There being no evidence in the case that the general officers of the defendant advised the wrongful act, or ratified it after it was done, this is not a case where exemplary or punitive damages can be allowed. The principal cannot be punished by awarding exemplary damages against him for the wilful, wrongful or malicious act of his agent or servant unless the wrongful act was done by the direction of the principal or was afterwards ratified by him. The extent of the damages in such cases is what the law calls compensatory. Compensatory damages embrace the reasonable expenses incurred by the plaintiff, if any, in curing or endeavoring to cure the injuries he received. Also the damages suffered, if any,

from the loss of time and inability to attend to his business, resulting from the injuries received. Also the bodily pain and suffering, if any, resulting from the injuries received and for the outrage and indignity put upon him; and if you find from the evidence that the plaintiff has not yet recovered from the injuries received or if you find that the injuries are permanent, you should add such damages as you believe from the testimony it is fair to infer the plaintiff will suffer in the future.

Taking all these elements into consideration, you will ascertain the amount of damages suffered by the plaintiff. He should be fully compensated. There has been much testimony as to the character and extent of the plaintiff's injuries, and surgical experts have been examined on this question. This evidence is entitled to your consideration, and it s for you to determine therefrom as well as from the other evidence in the case how great the injuries were, and whether they are permanent or not.

116 And, finally, gentlemen, you should examine all the facts in this case and determine it by the same rules, and influenced by the same motives, as though the defendant was a natural person defending against this charge. The law knows no difference between the rights of corporations and the rights of natural persons based upon the same facts.

Your verdict should be signed by one of your number as foreman, and in this form:

We, the jury, find for the plaintiff, and assess the amount of his recovery at $:

Or,

We, the jury, find for the defendant.

JAS. H. ROTHROCK, *Judge.*

To the giving to said jury the instructions numbered two, three, four, five, six, seven, eight, and nine, and each of them, and each part thereof, the defendant at the time excepted.

And afterwards, and on the 8th day of November, 1873, the jury returned into court with the following

Verdict.

We, the jury, find for the plaintiff, and assess the amount of his recovery at $12,000.

S. SIMPSON, *Foreman.*

And afterwards, and on the 10th day of November, 1873, the defendant filed a motion to set aside said verdict, and to grant a new trial in words and figures following, to wit:

Motion for new trial.

The defendant moves the court to set aside the verdict rendered in this case and grant a new trial therein for the following reasons:

1. That the court erred in admitting improper evidence on the trial objected and excepted to by the defendant.
2. That the court erred in excluding proper testimony.
3. That the verdict is excessive, and appears to have been given under the influence of passion and prejudice.
4. The court erred in refusing to give to the jury each and every of the instructions requested by the defendant.

5. The court erred in giving to the jury on its own motion the
117 instructions numbered two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9), and each of them.

6. That the verdict is contrary to law.

7. That the verdict is not sustained by sufficient evidence.

8. That the verdict is against the great weight and preponderance of the evidence.

N. M. HUBBARD,
E. S. BAILEY,
Defendant's Attorneys.

Afterwards, and on the 10th day of November, 1873, the court overruled the said motion for a new trial and rendered judgment on said verdict, to all of which the defendant then and there excepted at the time. And because these matters do not appear of record, the defendant brings this its bill of exceptions and asks that the same be signed and sealed by the court, which is accordingly done at the time.

JAS. H. ROTHROCK, *Judge.*

On the 10th day of November, 1873, the following

Judgment

was entered in said cause:

And now on this day, in this cause, the motion for new trial coming on for hearing, the court, being advised in the premises, considers that said motion be overruled; to which ruling of the court the defendant excepts. Judgment is thereupon entered upon the verdict as rendered herein in favor of the plaintiff and against the defendant, the Chicago & Northwestern Railway Company, for said sum of twelve thousand dollars, to draw interest at six per cent. per annum from this date, and for the costs herein made, taxed in the sum of two hundred and thirteen and six one-hundredths dollars, and that execution issue therefor.

And on the 18th day of November, 1873, the defendant perfected an appeal to the supreme court of the State of Iowa, by serving upon the defendant's attorneys and the clerk of the district court of Linn County, in said State, a notice of appeal.

118 APPENDIX.

(Caption to deposition of Ellen P. Fletcher. For deposition see page 7.)

In district court, Linn County, Iowa.

SEYMOUR J. McKINLEY
vs.
THE CHICAGO & NOTHWESTERN RAILWAY Company.

Deposition of witness produced, and sworn, and examined before me, a notary public, at my office, in Hennepin County, in the State of Minnesota, on the 21st day of September, 1872, by virtue of the annexed stipulation, and upon the interrogatories and cross-interrogatories thereto attached, to be read as evidence in a certain suit now pending

in the district court of Linn County, in the State of Iowa, wherein Seymour J. McKinley is plaintiff, and the Chicago & Northwestern Railway Company is defendant, on behalf of the plaintiff.

(Same caption is prefixed to deposition of Friend P. Fletcher. For deposition see page 11).

Plaintiff read in evidence from D'r Hamilton's work on "Fractures and Disiocations" the following extract. See reference to same on page 106.

FRACTURES OF THE CLAVICLE. (CAUSE.)

(Page 178.)—If we except gunshot fractures, the clavicle is broken in a large majority of cases by a counter stroke, such as a fall or a blow upon the extremity of the shoulder.

Occasionally it is broken by a direct stroke, as where a blow aimed at the head is received on the shoulder. It is sometimes broken by the recoil of an overloaded gun, especially when the person lies upon the ground with the butt of the gun resting against the clavicle.

119 (Page 179.)—I have once seen the clavicle broken by muscular action alone. A large, well built, and healthy man, aged 37, standing upon the ground, attempted to secure the braces of his carriage-top with his right arm, when he felt a sudden snap, as if something about his shoulder had given way. He did not, however, suspect the nature of the injury, and did not consult any surgeon until eight days after, at which time I found the right clavicle broken near its center, but rather nearer the sternal than the scapular extremity. The fragments were but slightly, if at all, displaced, but motion and crepitus at the point of fracture were distinct. The usual node-like swelling was also present, indicating the existence of a considerable amount of ensheathing callus. He had been unable to raise the arm to a right angle with the body since it was broken, but he had suffered no other inconvenience from it.

A similar case is reported in the number for January, 1843, of the American Journal of Medical Sciences, copied from the Revista Medica. The subject of this case was a colonel of cavalry, about sixty years of age. In mounting his horse he experienced a sensation as if something had broken, followed by acute pain in his left shoulder, and on examination it was found that the clavicle was fractured in the middle. The health of this gentleman had been impaired, it is further stated, by frequent attacks of syphilis.

Malgaigne has recorded three other examples of fracture of this bone from muscular action. And Parker saw a case which was produced by striking at a dog with a whip. The bone had been previously somewhat diseased, yet it united favorably.

Of these six cases five occurred on the right side, and always near the middle of the bone, if we except one case reported by Malgaigne, in which the point of fracture is not mentioned. In neither case did the fragments become displaced, only as they were found, in some of the examples, inclined slightly forwards.

(Page 182.)—With regard to the amount of displacement usually attendant upon fractures near the outer end of the bone, surgical writers have generally united in declaring that it was in a majority of cases very inconsiderable, while some have even affirmed that there would be no displacement whatever. Neither of which opinions, according to the observations of Robert Smith, of Dublin, is strictly correct. He has examined eight specimens of fracture of the outer extremity of the clavicle, contained in the museum of the Richmond Hospital School of Med-

ine; three of which were broken between the conoid and trapezoid gaments and are united with very little displacement, while the remaining five, broken beyond the trapezoid ligament, present a very marked deformity. * * * *

120 When the clavicle is broken between two fasciculi of the coraco-clavicular ligament, there is seldom any displacement of either fragment, and always much less than in fracture of any other portion of the bone. When displacement does occur it is usually limited to a slight alteration in the direction of the bone, by which the natural convexity of this portion of the clavicle is increased.

(Page 185.)—The greatest amount of shortening is generally found in those fractures which occur through the middle third. In fractures near the sternal end there is usually very little permanent displacement. The same is true when the fracture is at the acromial end, and between the coraco clavicular ligaments, as the observations of Robert Smith, already quoted, have sufficiently established; but if the fracture is beyond these ligaments the final displacement and deformity may be very great.

The presence of a small amount of ensheathing callus soon after the cure is completed sometimes increases the deformity. It is rarely seen to encircle the bone completely, and occasionally it appears to be most abundant in the direction of the salient points of the fracture, that is, above and below: so that unless the examination is made with care, the projecting points of callus which remain, sometimes after many years, may be easily mistaken for an intercepted fragment turned at right angles to the axis of the bone. Robert Smith has observed, also, that in cases of fracture external to the conoid ligament osseous matter is freely formed upon the under surface of each fragment, but there is seldom any deposits upon the upper surface of either. There osseous growths, occupying the situation of the coraco-clavicular ligaments, frequently prolong themselves as far as the coracoid process, and in some cases to the notch of the scapula. * * * * * *

And in the few cases found upon record of a ligamentous union, the functions of the arm do not seem to have suffered any serious ultimate injury, as the following example will illustrate:

Edmund Nugent, a stout Irish laborer, twenty-five years old, was received into the Buffalo hospital of the Sisters of Charity in March, 1854. Several years before he fell from a horse and broke his left clavicle at the outer end of the middle third. This was near Cork, in Ireland, and without consulting any surgeon or "handy man" he continued at work, holding the tail of the plough, nor from that day forward did he employ a surgeon or dress his arm, or cease from his work. * * *

In order that we might determine the amount of injury which he suf-
fered from the ligamentous union, we directed him to lift weights
121 placed on a table before him while he was seated upon a chair.
We ascertained from this experiment that with his left arm he could lift as much, within three ounces, as he could with his right, and he was not himself conscious of any difference.

A partial paralysis, with atrophy of muscles of the arm, accompanied also with more or less rigidity and contraction of the muscles, both of the arm and forearm, is, according to my observation, a more frequent result of these fractures. * * * * * *

Desault saw a case at Hotel Dieu in which, although the clavicle was not broken, the force of the blow upon the clavicle was sufficient to produce a severe concussion of the brachial plexus and paralysis of the arm.

FRACTURES OF THE CORACOID PROCESS.

(Pages 211, 212, and 213.)—D'r Jackson, of Boston, says that specimen number 453 in the museum of the Massachusetts Medical College seems clearly to have been a fracture involving the base of the coracoid process, and which, having taken place somewhere within a year of the death of the person, had become united by bone, and that just before death the process had broken off, and so completely as to involve a portion of the glenoid cavity. * * * * One example is said to have occurred in the practice of D'r Arnott at the Middlesex Hospital, London, in consequence of which the patient died, when a dissection disclosed the true nature of the accident. M'r South has also reported a case resembling somewhat Mussey's, but much more complicated. The humerus was partially dislocated forwards, the clavicle, acromial process, and the olecranon were broken, as well as the coracoid process. Neither the fracture of the clavicle nor of the coracoid process was made out until after the patient died, which was on the fourth day; the fact of the existence of these fractures being then ascertained by dissection. Erickson says there is in the museum of the University College a preparation showing a fracture at the base of this process, the line of fracture extending across the glenoid cavity. Duverney, Boyer, and Malgaigne have also reported four additional examples confirmed by dissections.

The existence of this form of fracture, established by at least 9 or 10 dissections, can no longer be denied. Yet it is usually accompanied with serious complications, such as must in most cases prove fatal. In the only two cases, however, in which I had reason to believe that I had to deal with a fracture of this kind, the symptoms and termination were less grave, although they were both complicated with an upward
122 dislocation of the outer end of the clavicle. A gentleman residing in the country was struck with a board which fell edgewise upon his shoulder. The fracture of the coracoid process does not seem to have been recognized by his surgeon. An apparatus was applied to retain the clavicle in its place. But after three months, when he called upon me, it still remained displaced as at first. During all this time the apparatus had been steadily kept on. * * * * * * * * * Some months later I examined the arm again and found the parts in the same condition as before; but the functions of the arm were not impaired. A girl was admitted to Bellevue Hospital in November, 1868, having fallen upon her left shoulder, and having sustained a complete luxation of the acromial end of the clavicle, upwards and outwards. Upon careful examination a fracture of the coracoid process was also diagnosticated, indicated by both mobility and crepitus.

Fractures of the ribs.

(Pages 172, 173, 174, and 175.)—The most common causes are direct blows of very great force in consequence of which sometimes the fragments are not only broken, but are more or less forced inwards; occasionally they are the result of counter-strokes, and the fragments, if they deviate at all from their natural position, are salient outwards; a species of fracture which I have not met with so often.

Malgaigne has collected eight examples of fractures of the ribs produced by muscular action, by the beating of the heart, &c., all of which occurred upon the left side. It is believed, however, that in all of these cases the ribs had become previously atrophied and perhaps undergone

other changes in their structure rendering them liable to fracture from the action of trivial causes.

Pathology, seat, &c.—The 4th, 5th, 6th, and 7th ribs are most liable to be broken. The upper ribs, and especially the first ribs, being so well protected in various ways as to greatly diminish their liability, while the loose and floating condition of the last two ribs gives them an almost complete exemption.

In my own cases I have found the first, second, and third ribs each broken four times, the fourth six times, the fifth twelve times, the sixth twelve times, the seventh nine times, the eighth, ninth, and tenth twice each. * * * * * * *

Prognosis.—Death occurs sooner or later in a pretty large majority of the cases in which the ribs have been broken, yet not often as a direct consequence of the fracture, but only as a result of the injury inflicted upon the viscera of the chest or of other injuries received at the same moment. The violent compression of the heart and lungs has frequently produced death, and sometimes, as I have more than once seen, almost immediately, or the patients have succumbed at a later period to acute pneumonitis. * * * * * * *

123

In several instances observed by me patients have suffered from pains in the side, occasionally from cough, etc., after the lapse of two or more years, and I suspect it is no uncommon thing for these injuries to entail some such permanent disability, but which is a consequence rather of the injury to the viscera of the chest than of any condition of the broken ribs themselves.

In general, simple fractures of the ribs unite in from 25 to 30 days. Malgaigne has seen one case of non-union. Huguier met with another upon the cadaver in which a complete false joint existed, furnished with a capsule and lined with a synovial membrane. Eve, of Nashville, Tenn., saw a case of non-union, occasioned probably by a caries or necrosis of the bone since it was accompanied with a discharge of matter, and in which a removal of the ends of fragments resulted promptly in a cure of the sinus; and Samuel Cooper says there is a specimen in the museum of the University College, of a fracture of six ribs, where the fragments are only connected by a fibrous or ligamentous tissue.

The union generally occurs with only a slight degree of displacement.

After the union is completed, even where there is no displacement, a certain amount of ensheathing callus may generally be felt at the point of fracture. Of five cases which I have carefully examined after recovery, in only one instance was I unable to detect any irregularity at this point.

Emphysema, which is almost certainly indicative of a fracture, is present in a pretty large proportion of cases. It has been observed by me in eleven out of twenty-five cases; generally it did not extend over more than two or three square feet of surface; but in one instance it finally extended over nearly the whole body. It is remarkable, however, that in only four of these eleven cases did the patients expectorate blood, and then in a very small quantity, and not until the second or third day.

(The following extracts were read on the trial of this cause by D'r R. N. Isham, in his testimony in behalf of the defendant. See reference to same on page 71 :)

[Holmes System of Surgery, 2d edition, 1870, volume 2, page 554.]

123½ The ordinary symptoms and diagnosis of a fractured rib per se will consist of, firstly, the sensation expressed by the patient of his having felt something snap or give way; secondly, his complaining of pain

at the seat of the injury, a kind of severe stitch in the side, or catching of the breath during an irregular respiration, while he carefully avoids to take a deep inspiration of a prolonged expiration; even the slightest attempt to cough distresses the patient and disturbs the fracture, giving rise to the sensation of grating. Thirdly, the partial arrest of the movement of the ribs on the affected side, as well as of those on the sound side, in consequence of their consonance of action; hence the respiration is carried on principally by the diaphragm and abdominal muscles.

[Malgaigne's Treatise on Fractures, American edition of 1859, page 412.]

This fracture is extremely rare and hardly occurs except along with other fractures, and with immense contusion of the soft parts; so that the cases of it are generally very grave. Dueverney relates the case of a girl, aged 20, who fell into a quarry and was found dead. The autopsy showed a fracture of the coracoid process and one of the neck of the scapula, besides fractures of several of the ribs. Fig. 23 represents a fracture of the coracoid process joined with numerous fractures of the scapula and humerus; the patient died before the callus had become solid. I have seen another instance in which death was hastened by the occurrence of an enormous axillary abscess. A patient of the same kind, whose case is published by South, died on the 5th day; another, treated by Arnott, lived until the tenth. Lastly, Boyer saw a fracture of the coracoid process, caused by a blow from the tongue of a carriage, in a man who died from the contusion of the soft parts; in this case the fracture seemed to be the only one present.

[Todd's Cyclopedia of Anatomy and Physiology, page 600.]

B.—Fracture of the coracoid process is a rare accident, and when it occurs it is generally the result of a severe injury in which the fracture of the bone is the least of the evils attendant on the compound injury. Thus Boyer gives us the account of a fracture of the coracoid process, produced by the blow of a carriage pole; the patient died in a few days afterwards, in consequence of the severe contusion he suffered at the moment of the accident. The coracoid process, when fractured at its basis, is pulled downwards and forwards by the lesser pectoral coracobrachialis and a short portion of the biceps muscle. We are told
124 that if the contusion accompanying this accident be slight, we can seize the fragment between the finger and thumb and prove at once the mobility of the fragment and existence of crepitus.

"If," says Boyer, "the soft parts were in their natural state, we could easily recognize the fracture of the coracoid process, when it has occurred; but so much force is necessary to produce this fracture, that the considerable swelling which always accompanies it prevents us from being able to recognize the character of the injury so that it was not generally ascertained except in the dead body."

125 *Assignment of errors.*

The appellant says there is manifest error on the face of the record in this, to wit:

1. The court erred in overruling the motion of defendant to set aside the verdict and to grant a new trial.

2. The court erred in rendering judgment against defendant upon the verdict.

3. The court erred in refusing the instructions asked by defendant, and each of them.

4. The court erred in giving to the jury, on its own motion, each of the instructions numbered four, five, six, seven, eight, and nine.

5. The court erred in holding that the verdict was supported by sufficient testimony, and in refusing to hold that the verdict was contrary to the evidence and unsupported by sufficient testimony.

6. The court erred in not sustaining defendant's motions to suppress depositions, as shown by the record.

7. The court erred in admitting improper and hearsay evidence offered by plaintiff, as shown by the record.

8. The court erred in rejecting competent testimony offered by defendant.

Wherefore, &c.

E. S. BAILEY,
N. M. HUBBARD,
Attorneys for Appellant.

129 And now, on this 22d day of April, 1874, appears the following record entry:

SEYMOUR J. McKINLEY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Company, app'l't. } Appeal from Linn district court.

On this day this cause is submitted to the court on printed and oral argument by the counsel.

130 And on this 8th day of December, 1875, appears the following record entry:

SEYMOUR J. McKINLEY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Company, app'l't. } Appeal from Linn district court.

In this cause, the court being fully advised in the premises, file their written opinion reversing the judgment of the district court, Beck, J., filing a dissenting opinion.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, reversed and set aside; that further proceedings be had in said court not inconsistent with the opinion of this, and that a writ of procedendo issue accordingly.

It is further considered by the court that the appellee pay the costs of this appeal, taxed at $, and that execution issue therefor.

131 And on the 9th day of December, 1875, a procedendo was issued to the district court of Linn County, in words and figures following, to wit:

THE STATE OF IOWA, *ss:*

The State of Iowa to the district court for the county of Linn:

Whereas the supreme court of said State being lately certified of the record and proceedings in a certain cause which was in the district court for the county of Linn, and State aforesaid, wherein Seymour J.

McKinley was plaintiff and the C. and N. W. R. R. Co. was defendant, in which said cause judgment was rendered against the defendant, from which judgment so rendered the said defendant appealed to the said supreme court, and the said court having duly examined the record and proceedings aforesaid in the premises at Des Moines, in said State, on the 8th day of Dec., 1875, did reverse the judgment aforesaid as rendered in the court below, and order further proceedings to be had in said court not inconsistent with the opinion of the supreme court:

132 Therefore you are hereby commanded that with the speed which of right and according to law you may, you proceed in the same manner as if no judgment had been rendered, or appeal had been taken and prosecuted in this court, anything in the record or proceedings aforesaid heretofore certified to the contrary notwithstanding.

Witness, E. J. Holmes, clerk of the supreme court, with the seal of said court hereunto affixed at Des Moines this 9th day of December, A. D. 1875.

[SEAL.]

E. J. HOLMES,
Clerk of the Supreme Court.

On the back of said procedendo appears the following indorsement: "Filed Dec. 15, 1875. J. L. Crawford, clerk."

133 And on the 15th day of December, 1875, as shown by certificate of clerk, there was filed in the office of the district court of Linn County a petition and bond to remove said cause to the United States circuit court for the district of Iowa, in words and figures following, to wit:

Petition to remove cause to U. S. circuit court for the district of Iowa.

Linn district court.

SEYMOUR J. McKINLEY *ag't* THE CHICAGO AND NORTHWESTERN RAILWAY Company.	In vacation before the March t., 1876.

To the district court for Linn County, Iowa:

The Chicago and Northwestern Railway Company respectfully states that there is now pending in this court a suit wherein Seymour J. McKinley is plaintiff and this petitioner is defendant; that said McKinley is a citizen of the State of Iowa, and was a citizen of said State

134 at the time of the commencement of this action; that your petitioner, the Chicago and Northwestern Railway Company, is a citizen of the State of Illinois, duly organized under and by virtue of the laws of said State of Illinois, and was a citizen of said State at the time of the commencement of said action in this court, and has never been organized under the laws of Iowa, and is not and never has been a citizen of the State of Iowa; that the matter in dispute in this action exceeds the sum of five hundred dollars, exclusive of costs; that special bail was not originally required in said cause.

Wherefore petitioner prays that this cause be removed for trial into the next circuit court of the United States for the district of Iowa; and petitioner now here offers good and sufficient surety in the sum of one thousand dollars that it will enter in said court on the first day of the next term thereof a copy of the record in said cause, and pay all

costs which may be adjudged against petitioner if said court shall hold that said cause has been improperly or wrongfully removed
135 thereto.

THE CHICAGO AND NORTHWESTERN RAILWAY CO.,
By E. S. BAILEY AND N. M. HUBBARD,
Att'ys.

STATE OF IOWA,
Linn County, ss :

I, N. M. Hubbard, being duly sworn, on oath say, that I am one of the attorneys of the Chicago and Northwestern Railway Company; that I have equal knowledge of all the matters alleged in the foregoing petition with any officer of said company: that I know the contents of said petition, and that the matters and things therein stated are true as I verily believe.

N. M. HUBBARD.

Subscribed and sworn to before me and in my presence by N. M. Hubbard, this 9th day of December, 1875.

[NOTARIAL SEAL.]

C. J. DEACON,
Notary Public for Linn Co., Iowa.

The Chicago and Northwestern Railway Company, as principal, and Charles Weare, as surety, hereby acknowledge themselves indebted to Seymour J. McKinley in the penal sum of one thousand
136 dollars, for the payment of which we bind ourselves and personal representatives jointly and severally.

This bond is upon this condition: Whereas there is now pending in the district court for Linn County, Iowa, a suit, wherein Seymour J. McKinley is plaintiff, and said The Chicago and Northwestern Railway Company is defendant, the said railway company herewith file' its petition to remove said cause into the next circuit court of the United States for the district of Iowa, for trial. Now, if said railway company will cause a copy of the record in said cause to be filed in said circuit court of the United States for the district of Iowa, on or before the first day of the next term thereof, and pay all costs which may be adjudged against said railway company, if said circuit court shall hold that said cause was improperly or wrongfully removed thereto, then this bond to be void.

Dated this Dec. 9, 1875.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
By N. M. HUBBARD, *Att'y Principal.*
CHARLES WEARE, *Surety.*

137 STATE OF IOWA,
Linn County, ss :

I, Charles Weare, being duly sworn, on oath say, that I am a resident and freeholder in the State of Iowa; that I am worth two thousand dollars over and above all my debts, and have real estate in said State, subject to execution, to an amount in value greater than two thousand dollars.

CHARLES WEARE.

Subscribed and sworn to before me and in my presence by the said Charles Weare, this 14th day of December, 1875.

Witness my hand and notarial seal hereto set.

[SEAL.]

C. J. DEACON,
Notary Public for Linn County, Iowa.

the wilful, wrongful, or malicious act of his agent or servant unless the wrongful act was done by the direction of the principal or was afterwards ratified by him. The extent of the damages in such cases is what the law calls compensatory. Compensatory damages embrace the reasonable expenses incurred by the plaintiff, if any, in curing or endeavoring to cure the injuries he received; also the damages suffered, if any, from the loss of time and inability to attend to his business, resulting from the injuries received; also the bodily pain and suffering, if any, resulting from the injuries received; and for the outrage and indignity put upon him. And if you find from the evidence that the plaintiff has not yet recovered from the injuries received, or if you find that the injuries are permanent, you should add such damages as you believe from the testimony it is fair to infer the plaintiff will suffer in the future."

I.

Under the opinion as it now stands, the cause is reversed because the court below ruled that under the head of compensatory damages, plaintiff was entitled to compensation "for the outrage and indignity put upon him."

143 In his argument Judge Cole declares this element of damage "to be purely and highly exemplary or imaginary and speculative," and further, that "the phrase, 'for the outrage and indignity put upon him,' is but an intense form of expression, conveying the idea of damages for the wounded feelings, or of injury to feelings, and damages for such outrage or wounded feelings are essentially exemplary or imaginary and speculative, and not actual. If they are not, it seems to us there can be no such thing as speculative damages."

The question, therefore, for consideration, presented by this petition for rehearing, is whether the plaintiff suffered actual damages from the outrage and indignity that was heaped upon him, or whether the indignities and abuse inflicted upon him, the degradation caused him thereby, and destruction of his personal ease and comfort during his journey, and the mental pain and anguish, with their consequent nervous and physical effects, caused by being brutally beaten, abused, threatened, and vilified in the presence of others, *to* be deemed of no moment, and as belonging wholly to the domain of speculative, imaginary, and exemplary damages.

In considering this question, let us first glance briefly at the relation, duties, and obligations existing between the parties. The defendant was a common carrier engaged in the transportation of passengers for hire over the various lines of road owned and controlled by it, in Illinois, Wisconsin, Iowa, and other States.

In March, 1872, plaintiff purchased a ticket good for a passage from Chicago to Beloit. In selling such tickets, and thereby entering into a contract to convey plaintiff from Chicago to Beloit, what duties and obligations were assumed by defendant?

This enquiry is fully answered in the case of Rich vs. Bryant, 106 Mass., 180, which was an action brought to recover damages against the owners of a steamboat, engaged in the business of carrying passengers for hire, for injuries received at the hands of the steward and waiters on the boat. The facts are very similar to those of the case at bar.

144 The judge who tried the case instructed the jury, "That the defendants, as common carriers of passengers, are bound to use the utmost care which is consistent with the nature and extent of the business in which they are engaged, in the transportation in safety of their

passengers. This duty requires not only much care in the management of the vehicle itself, but in providing and maintaining all such reasonable arrangements in regard to the control, discipline, and supervision of all persons on board, as the safety of the passengers may require, as a prudent man would to guard against danger from any source arising, which may naturally, and according to the usual course of things, be expected, and, applying this rule a little more exactly to the circumstances of the case, the precise rules of duty to which the defendants are to be held are these: They are bound to select and employ a sufficient number of suitable and competent servants to meet any exigency which they might, in the exercise of the greatest vigilance and care consistent with the nature and extent of their business, have reasonably anticipated; they are bound to exercise the same degree of care in maintaining order and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur, in view of all the circumstances of the case; and all the agents and servants of the defendants are bound, in their respective spheres of duty, to protect a passenger against acts of violence of their employees, as well as of strangers, so far as the same is reasonably in their power. When actual violence has commenced, it then becomes the further duty of the defendants, through their appropriate servants and agents, to do all the circumstances allow to check and prevent the continuance of such violence upon their passengers; and if they fail to do all they could or ought to have done to stop the continuing assault upon the plaintiff, then, for any injury resulting from such negligence after the assault might have been checked as above, the defendants are liable."

The case was taken to the supreme court, and the rules given above
145 were affirmed, the court citing a number of authorities in support thereof, and among others quoting from the opinion of Judge Clifford in case of Pendleton vs. Kinsley (U. S. circuit court for Rhode Island), who held as follows:

"Passengers do not contract merely for ship-room and transportation from one place to another; but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons either by the carrier or his agents employed in the management of the ship or other conveyance."

The court further held that it was the duty of the court below "to state the contract which the carriers had made, and instruct the jury that each of the hands employed on board the ship was bound to do faithfully the duty assigned to him in the performance of this contract, and not one of them was at liberty to do an act in violation of it, and if he did so the defendants were liable."

In support of this doctrine see also Hinds vs. P., F't W. & C. R. R. (53 Penn, 512); Simmons vs. Steamboat Co. (97 Mass., 369); Eaton vs. Boston & Lowell R. R. (11 Allen, 504); Flint vs. N. & N. Trans. Co. (34 Conn, 554).

In the case of Chamberlain vs. Chandler (3 Mason, 245), Judge Story defines the contract, duty and liability of the carrier as follows: "The passenger's contract with him is not for mere ship-room and personal existence on board, but for reasonable food, comforts, necessaries, and kindness.

"It is a stipulation, not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. * * *

"It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed: the law looks on them as unworthy of its cognizance. The mas-
146 ter is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet if he with'olds a blow, the victim may be crushed by his unkindness; he commits nothing within the reach of civil jurisprudence. My opinion is, that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries.

"In each case the contract of the passenger for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage."

In the case of Goddard vs. Grand Trunk Railway (57 Maine, 212), a large number of authorities are reviewed, and a full discussion is had of the various points involved in this case, and upon this point the court hold as follows:

"The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust.

"The law seems to be now well settled, that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. * * * He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through negligence or willful misconduct of the carrier's servant, the carrier is necessarily responsible."

From these authorities, and others of like nature that might be cited, we find that common carriers of passengers are bound to protect the passenger from injury, insult, and outrage on the part of their employees, and as far as possible on the part of third parties. In other words, the passenger is entitled to demand good treatment at the hands of the carrier and employees, and protection against personal rudeness,
147 insult, or indignity, and the carrier is bound by his contract to fulfill these obligations to their utmost extent. If the carrier fails to meet the obligations imposed by the contract he assumes, in undertaking to safely transport the passengers committed to his care, he thereby commits a breach of his contract, and for such breach is liable to respond in damages to the party who suffers from the breach of the contract.

In order to fairly present our position, let us briefly restate the propositions we have so far maintained, and see whether we are in error therein. Under the authorities we have already cited, and the principles deduced therefrom, is it or is it not true that a common carrier of passengers is in duty bound by his contract to safely convey his passenger, so far as it lies within his power so to do, and is or is not the passenger entitled to demand good treatment from the carrier and his employees, and protection from personal rudeness, injury, and insult on part of the carrier and his employees?

If the uniform rule given by all text writers and laid down by all courts that have considered this question is to control the answer to be given, there can be but one response thereto, and that is that the carrier is bound to afford protection against personal rudeness, injury,

insult, and outrage on the part of his employees. A failure to afford such protection on part of the carrier is, therefore, a breach of his contract.

A breach of contract is a cause of complaint on behalf of the party aggrieved, or, in other words, constitutes a case of action. If, therefore, it be law that the common carrier is by contract bound to afford good treatment and protection to the passenger from insult, indignity, and assault on part of employees, and if it be shown as a matter of fact in a given case that the passenger whilest on the vehicle and in the car of the carrier has been assaulted, insulted, and outraged by the employees of the carrier, whose duty it was to protect the passenger against such abuse and indignities, it must follow that such passenger has a cause of action against the carrier for such breach of contract.

148 Suppose a case of this character. A. B. is the owner of a steamboat engaged in the business of carrying passengers for hire. C. D. takes passage thereon, paying the usual fare. A. B., the owner of the boat, again demands payment of the fare, which is refused by C. D. A. B. then, in presence of the other passengers, threatens C. D. with personal violence, calls him a liar, threatens to throw him off the boat, denounces him as a dead beat, and otherwise abuses and ill treats him. Would or would not such conduct on part of A. B. be a breach of his contract with the passenger which would subject him to an action on part of C. D.?

Can it be possible that this court will commit itself to the doctrine that in such a case the passenger cannot recover damages; that such breaches of contract are damnum absque injuria? We have supposed a case in which no hand is actually laid upon the person of the passenger.

The breaches alleged are the committing of an assault; that is, the threat to commit personal violence, applying degrading and foul epithets in the presence and hearing of other persons, under such circumstances, that the necessary consequence thereof is to affect the peace of mind of the passenger, to degrade him in the estimate of the bystanders, and to destroy his personal comfort during the trip he is making on the vehicle or boat of the carrier. Would not the carrier in such case be liable?

In this supposed case all question of the liability of the carrier for the acts of his employees is eliminated, because we have supposed a case in which the carrier in person is guilty of the wrongs complained of; and the question we now present is whether such acts, if done by the carrier, are or are not breaches of the carrier's contract with the passenger?

If, then, the passenger sues the carrier upon his contract, alleging the breaches we have given above, can or can he not recover damages therefor?

149 If these acts are a breach of the carrier's duty to the passenger, then a cause of action exists in favor of the passenger, and we reach the conclusion that a liability has been shown to exist on part of the carrier. The only remaining question is as to the damages, and that resolves itself into the questions:

1st. Whether an assault is a ground of damages?

2d. Whether a person suffers injury by being abused, vilified, and insulted without cause in the presence of others?

3d. Whether the mental pain and disquiet, with the consequent nervous and bodily effects caused thereby, resulting from abuse and indignity inflicted upon one in the presence of others, causes injury to the sufferer?

1. As to the first question, there can not be any doubt that an assault is a ground for damages.

Thus, in Wheaton's Selwyn's Nisi Prius, vol. 1, page 27, we find it laid down, "For an assault, which is considered as an inchoate violence, the law has provided a remedy by an action of trespass vi et armis at the suit of the injured party for the recovery of damages commensurate to the injury sustained." So, also, in Hurst vs. Carlisle, 2 Penn'a Reports (Penrose & Watts), 176, it was ruled that for an "attempt to commit a battery, wounding, or mayhem (which in law is termed an assault), the injured party may have a remedy in damages by action of trespass. Even for a threat, or menace to commit any of these injuries, or to pull down a house, or the like."

So in Lewis vs. Hoover, 3 Blackford, 407, the court below ruled that if an assault only was proven, but it was not proven that damages resulted, the verdict must be for defendant, but the Supreme Court, on appeal, reversed the case, holding that an assault "is an inchoate violence for which the party assaulted may have redress by an action of trespass vi et armis, and shall recover damages as a compensation, although no actual suffering or injury is proved."

150 An assault is punishable both under the common law and under the statute of Iowa, as a criminal offense against the rights of persons, and it would be an anomaly to maintain the doctrine that an act which was sufficiently grave in its consequences to merit punishment as a criminal offense, was yet of such a character as not to entitle*d* the party aggrieved thereby to damages therefor in a civil suit.

2. Does not a person suffer injury by being abused, vilified, and insulted in the presence of others, without cause?

Do not such acts tend to lower a person in the estimation of others, or otherwise to degrade him? And is not such an injury an actual one?

3. So, also, if a passenger instead of being protected from violence, indignity, and outrage, so that he may enjoy his journey, as he is entitled to, is grossly abused and outraged, causing such mental pain and disquiet as to destroy his peace and comfort during the time he is under the care of the carrier, is he not entitled to compensation for such injuries?

So, also, if a passenger is subjected to such abuse and indignity as causes mental pain and disquiet, with the nervous and bodily effects that flow therefrom, is he not entitled to compensation therefor?

These latter propositions seem to us so plain and reasonable as not to need citation of authorities, but if the court wishes to examine authorities in support thereof, we refer to those cited in the second division of our argument, where we have collected a number that directly support our propositions.

If, then, any of the several grounds of damages we have enumerated should be sustained in the case we have supposed, the conclusion is inevitable that C. D., the passenger, could recover damages against A. B. the carrier, for the alleged breach of contract. In the case supposed,

151 the acts constituting the breach of contract are supposed to have been committed by the carrier himself, but it is apparent that this fact does not control the question of whether they were or were not breaches of the contract of the carrier.

As we have already seen, the contract of the carrier binds him to afford protection to the passenger against ill treatment, not only on his own part, but on the part of his employees, and as far as possible on the part of all third parties. The contract of the carrier is therefore broken just as much by ill treatment on the part of the employee as

by ill treatment on the part of the principal. So the injury to the passenger is just the same, and his right to compensation is just the same, whether the act done be the act of the carrier himself or the act of the employee, provided the act be a breach of the carrier's contract.

The injury to the passenger is just the same whether the indignity be inflicted by the carrier in person, or by an employee, or, in other words, the damages received or suffered by the passenger in consequence of outrage, indignity or insult inflicted on him are just as actual and certain when inflicted by an employee as when inflicted by the carrier in person.

Therefore, if the conclusion is reached that under the circumstances above supposed the passenger would be entitled to recover damages by way of compensation for an assault, outrage and indignity committed by the carrier himself, can there be doubt that the passenger would be equally entitled to recover damages by way of compensation for an assault, outrage, and indignity committed by an employee of the carrier whilst acting in the scope of his employment? In both cases the ill treatment inflicted upon the passenger would be a breach of the carrier's contract, and the results to the passenger would be the same, so that it seems clear that the only consistent position that can be taken is to hold either that in neither case can the passenger recover, or that he can recover in both cases. If we understand the position taken by Judge Cole, it is that the servant or employee would be responsible for the damages caused by outrage and indignity to the passen-
152 ger, but that the carrier would not be liable, because such damages are not actual, but highly speculative and exemplary.

Such position is wholly untenable in view of the duties and obligations assumed by the carrier, and it seems to us that Judge Cole has, in his opinion, wholly ignored the fact that the carrier is by contract bound to afford the passenger good treatment and protection against insult and outrage on his own part and on the part of his employees.

The moment it is admitted that outrage and indignity cause actual damage to a passenger, as against the employee, then we cannot see how the nature of the damages changes from actual to highly speculative, because it is further shown that the carrier is bound by his contract to protect the passenger against such outrage and indignity, and is bound by his contract to make good the damages caused thereby to the passenger.

If outrage and damage do not cause actual damage to the recipient, then the latter cannot recover damages therefore, under the head of actual damages, against either the carrier or the employee. If outrage and indignity do cause actual damage to the recipient then the recipent is entitled to recover therefor against both the party who actually inflicts the same and against the party who is bound by contract to protect the passenger against the same. The party injured has his choice to sue either, but the character of the damages he has received does not pass from actual to exemplary, and vice versa, according to his election to proceed against the one or the other. His right to recover exemplary damages may be determined in a given case by the fact whether he sues one or the other, but the damages that would be actual in a suit against the employee would be actual in a suit against the master.

When we come to discuss the question whether the plaintiff is entitled to recover damages over and above his actual damages, then the question of whether the employee or master is sued might have weight, but that is for the reason that when we pass from the consideration of actual to exemplary damage, we pass from the consideration of

153 the injuries actually received by the plaintiff to a consideration of the mode or manner of their infliction by the wrong-doer, or in other words, whether they were inflicted wantonly, maliciously, or as a result of gross negligence.

It seems clear to us, therefore, that Judge Cole is in error in holding that though plaintiff might recover under the head of actual damages for the outrage and indignity put upon him, in a suit against the brakeman, that he could not in a suit against the carrier recover damages for such outrage and indignity, because the damages caused thereby are not actual, but purely speculative, imaginary, and exemplary.

II.

In the opinion prepared by Judge Cole, he asserts broadly that damages caused by outrage and indignity are "purely and highly exemplary or imaginary and speculative. * * * That the phrase 'for the outrage and indignity put upon him,' is but an intense form of expression conveying the idea of damages for the wounded feelings, or for injury to feelings, and damages for such outrage or wounded feelings are essential, exemplary, or imaginary and speculative, and not actual." The learned judge did not deem it wise to attempt to give any reasons showing that such a doctrine is correct on principle, nor did he quote any authorities supporting the proposition. The reason why he did not cite authorities is easily understood. There are none to be found in the reports. True, a reference is made to the case of Johnson vs. Wells, Fargo & Co., 6 Nevada, 224, as a case in point, but an examination of the case shows that the question involved in the case at bar was not involved or presented in that case, as there was no pretense or charge of any outrage or indignity made therein, nor of any wounded feelings or injury to the sensibilities.

To cite such a case, however, as though it were in point, shows the utter lack of authority to support the positions taken by Judge Cole.

154 We now call the attention of the court to a few of the many well considered cases in which the contrary doctrine is announced and well sustained, both on principle and authority.

In Canning vs. Inhabitants of Williamstown (1 Cushing, 452), it was ruled by the supreme court of Mass., that although "the bodily injury may have been very small, yet if it is a ground of action within the statute, and caused mental suffering to the p'aintiff, that suffering was a part of the injury for which he was entitled to damages."

In Meaher vs. Driscoll (99 Mass., 281), the court held that, "We know of no rule of law which requires mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness."

In Smith vs. Holcomb (99 Mass., 555), it is ruled that "the insult and indignity inflicted upon a person by giving him a blow with anger, rudeness, or violence occasion mental suffering. In many cases they constitute the principal element of damage. They ought to be regarded as an aggravation of the tort, on the same ground that insult and indignity offered by the plaintiff to the defendant, which provoked the assault, may be given in evidence in mitigation of the damages. Even when there is no insult or indignity, mental suffering may be a ground of damage in an action of tort for an injury to the person."

So also in New Hampshire, the same doctrine is expressly recognized.

In Holyoke vs. Grand Trunk R. R. (28 N. H., 545), it is held that "plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering both of body and mind, which are shown to be the immediate and necessary consequences of the injury wrongfully received. Also exemplary damages may sometimes be recovered in this form of action, embracing cases of gross negligence."

155 In Connecticut the same principle is adopted.

In Masters vs. Town of Warren (27 Conn., 300) it is held that the jury may take into consideration, in estimating the damages in such a case as this, "the mental sufferings of the plaintiff naturally incident to the risk and danger." See also Lawrence vs. Housatonic R. R. Co. (29 Conn., 390).

In Seeger vs. Town of Barkhamstead (22 Conn., 298) the court rule: "That the plaintiff is entitled to be compensated for his actual personal injury, there is of no question.

* * * Such actual injury is not confined to the wounds and bruises upon his body, but extends to his mental sufferings. His mind is no less a part of his person than his body, and the sufferings of the former are oftentimes more acute and more lasting than the latter.

* * * * And to say that it does not enter into the character and extent of the actual injury, and form part of it, would be an affront to common sense."

In Maryland the same rule has been repeatedly affirmed.

In Stockton vs. Fry, (4 Gill, 497,) the court held that the jury, in computing damages, should take into consideration the mental and physical sufferings sustained by plaintiff, and in Bannon vs. B. & O. R. R. Co. (24 Maryland, 109) the same rule is given.

In Georgia, in case of Smith vs. Overby (30 Ga., 248), the court, in discussing the question of damages, reasons as follows:

"An assault and battery is committed on the person by pulling plaintiff's nose or spitting in his face, the object being to degrade him. What, I ask, is the actual injury—the mere bodily suffering? That is nothing. Man has a moral as well as a physical nature. Here the injury is to his feelings, his honor, his pride, his social position. Suffer these to go unprotected, unredressed, and life itself is no longer tolerable or desirable. Hence the jury in such case should render larger damages, not as punishment, but to compensate the actual injury."

156 So in Ohio we find the same rule adopted.

In Smith vs. P., Ft W. & C. R. R. (23 Ohio, 10), to which case we specially invite the attention of the court, it is held: "This process of reasoning brings us to the inevitable conclusion that injuries to the person, whether they consist of mental or physical pain, as well as loss of time or property, which naturally and necessarily result from the wrongful and deliberate act of the defendant, are proper subjects for consideration of the jury in their estimate of compensatory damages." In New York we find the same rule fully recognized.

In Ransom vs. N. Y. & E. R. R. Co. (15 New York, 415) in which case the court of appeals affirmed a verdict of $14,000 against the company, the court approved the cases in Connecticut and other States in which the doctrine we contend for is laid down, and fully affirmed the same principal, and the same doctrine is held in Matteson vs. N. Y. Central (63 Barbouer, 379).

In Hamilton vs. Third Ave. R. R. Co. (53 New York, 25) it was held that plaintiff was entitled to compensatory damages, which in-

cluded injury to his feelings caused by wrongful expulsion from the cars.

In Pennsylvania the supreme court hold the same doctrine. See Pa. & Ohio Canal Co. vs. Graham (63 Penn., 299).

Indiana sustains the same doctrine, the supreme court of that State ruling, in Faber vs. Hatson (5 Ind., 322), that in trespass for assault and battery the jury are not restricted to a consideration of the plaintiff's mere pecuniary loss, "but they may consider every circumstances of the act which injuriously affected the plaintiff, not only in his property, but in his person, peace of mind, and individual happiness."

And in Cox vs. Vanderkleed (21 Ind., 164) the same rule was approved.

California follows the same general doctrine, the supreme court holding, in Fairchild vs. California Stage Company (13 Cal., 607), that the plaintiff is entitled to recover for "mental anguish."

157 Iowa also affirms the same principle. In Muldowney vs. Illinois Central R. R. Co. (36 Iowa, 46), it is held:

"The court, in substance, instructed the jury that the plaintiff is entitled to recover the amount which was due Laughlin at the time suit was brought, including compensation for bodily pain and mental anguish. In this appellant insists the court erred. In our opinion the instruction was right. The action was commenced by Laughlin. If he had survived until after the trial, his bodily pain and mental suffering would have constituted proper elements of damage."

Turning from the reported cases to text-books of approved authority, we find the same rule stated.

Thus Shearman & Redfield on Negligence, section 606, states the rule to be that, "in an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure * * * and a fair compensation for the physical and mental suffering caused by the injury."

Sed'wick adopts the same rule; see his work on damages, pages 699 and 700, and notes, in which the authorities are fully referred to.

In Waterman on Trespass, 1st, pages 248 and 249, in treating of assault and battery, it is stated:

"The authorities class assault and battery with other causes of action, touching the power of juries in the assessment of damages, and allow them to a great extent the exercise of their own discretion, there being in general no precise rule by which the injury can be measured. The jury may have regard to time and place, and in fact every other circumstance which has injuriously affected the plaintiff. He is entitled to recover the bodily and mental pain endured, and for the loss sustained; and the expense of litigation may be taken into consideration.

* * * * * * *

"The insult and indignity inflicted upon a person by giving him
158 a blow with anger, rudeness, or insolence occasion mental suffering. In many cases they constitute the principal element of damages."

2nd. Outrage and indignity in themselves considered, without reference to the mental pain caused thereby, form a positive element of damages in cases of this character. They tend to degrade a person in the estimate of others. No matter how innocent of wrong a person may be, if he has been ejected from the cars, or beaten or abused, the mere fact itself of the infliction of such wrong, necessarily raises a presumption against the person in the estimate of the public.

The unwillingness on the part of the public to believe that a great

corporation like the appellant, or its employees, would, without provocation, set upon, abuse, and grossly maltreat a passenger, naturally leads the public to believe that the party injured has been himself guilty of wrong, or at least of a willingness to engage in unseemly broils and disturbances of the public peace. This tends to degrade a person in the public esteem, and thus constitutes an element of damages for which the party injured should be compensated.

2 Greenleaf on Evidence, 267.

In C. & A. R. R. Co. vs. Flagg (43 Illinois, 368), it is ruled, "That where the plaintiff has been guilty of no delinquency, and his legal rights have been violated in expelling him from the train, it was proper also for the jury to consider not only the annoyance, vexation, delay, and risk to which he was subjected, but also the indignity done to him by the mere fact of expulsion."

3rd. Outrage and indignity accompanying a tort are to be weighed by the jury as elements of actual damage, in that they are aggravations of the tort itself, on the same principle that the jury may consider in mitigation of the damages any like facts constituting a provocation of which plaintiff may have been guilty.

1 Waterman on Trespass, 249.

2 Parson on Contracts, 168 and note.

159 In the case of Coppin vs. Braithwaite (8 Jur., 875), cited by Parsons, it was held that "where defendants by their agents caused the plaintiff to be put ashore at a point other than his destination, in a scandalous and disgraceful manner, and used toward him, contemptuous and insulting language, these aggravating circumstances could be shown to increase the damages." Sedgwick on Damages, 6th edition, 566, and note.

4th. But the court in determining this case must consider all the facts connected therewith. It is proven that not only was plaintiff injured by the actual beating and bruising he received, but he was also abused and vilified by both the brakeman and conductor. The evidence shows that after McKinlay reached his seat and the conductor had come into the car, McKinlay appealed to him, and told him of the occurrence. The conductor and brakeman both insulted him, called him a liar and other degrading epithets, and the brakeman threatened to throw him out of the car. See pages 8, 12, 13, and 18 of abstract. This was done in the presence of other passengers.

These facts are set forth in the petition filed in the case, as constituting part of plaintiff's cause of action. They constitute an assault in themselves, and certainly were properly submitted to the jury as proper elements of damages.

Judge Cole did not deign to notice any of these authorities, but simply contented himself by a bare reference to the case of Johnson vs. Wells, Fargo & Co. (6 Nevada, 224), "for a discussion and review of cases showing that pain of mind and indignity cannot be other than exemplary damages." Let us examine that case for a moment and see whether it bears out the learned judge in his assumption.

The facts out of which the action arose were briefly these: Wells, Fargo and Co. owned a stage-line in Nevada. Through some negligence of a driver a coach was overturned, and an iron casting which formed part of the freight rolled over the leg of one of the passengers, severely injuring him. He sued Wells, Fargo & Co. for damages. On the trial, the judge ruled that the jury might consider the bodily pain suf-

160 fered and the mental pain caused by the injury as distinct elements of damage. On appeal, the supreme court of Nevada, by

a divided court, held that the court below erred in submitting these as distinct elements of damage in such a case. The judge giving the opinion goes so far as to hold that damages for bodily pain and suffering ought never to have been recognized as elements of damage, but he concedes that the doctrine has become too well settled by authority to be disturbed. As a conclusion, he states "that while it may be possible to compensate bodily pain, and so much of mental suffering as may be indivisibly connected therewith (and this rather on authority than reason), yet that it is absolutely impossible to measure mental agony by money, and that no established rule authoritatively commands such a futile attempt, and consequently it must be held that so much of the instruction given herein as allowed the jury to consider the plaintiff's pain of mind aside and distinct from his bodily suffering was error."

Now as we have already stated, the supreme court of Nevada were not considering the question whether outrage and indignity causing mental pain and agony were elements of actual damage, but only the question whether, if a person receives through an accident, wholly free from all evidence of outrage and indignity, a bodily hurt, he can recover for pain of mind, aside and distinct from the bodily pain; meaning of course pain of mind caused by the wound or bodily injury received. The Nevada court hold the doctrine in that case that the bodily pain and mental pain caused by a bodily hurt cannot be separated into two distinct elements of damage, but that plaintiff was entitled to be compensated "for the bodily pain and so much of mental suffering as may be indivisibly connected therewith." In other words, that court held that the one cause, to wit, the bodily wound or injury, could not be held to produce two distinct elements of damage, to wit, the bodily pain and mental pain, but that the jury could consider and assess damages for the bodily pain and so much of mental suffering as might be indivisibly connected
161 therewith. We think the court displayed in this ruling a disposition to draw distinctions so fine as to be practically worthless when given to a jury for their guidance in assessing the damages in such a case but however that may be, it is apparent that the court did not intend to lay down a rule to govern in cases involving the element of damages caused by indignity and outrage which cause mental pain and agony wholly unconnected with the mere wounds or bruises received. This question, which is the only one involved in the case at bar, was not before the supreme court of Nevada, was not considered by it, nor embraced within the decision given, so that it would seem, so far as the opinion given by Judge Cole is predicated upon that case (and it is the only one he refers to), it stands absolutely without any support whatever.

But furthermore, in regard to the decision actually made by the supreme court of Nevada, it is directly in conflict with the decided weight of authorities in other States, and is in opposition to the decisions of this court upon the very point decided in that case.

In Muldowney vs. Illinois Central R. R. Co. (36 Iowa, 468), a suit brought to recover damages for injuries received by a brakeman by being crushed between two cars, it is held by this court as follows:

"This court, in substance, instructed the jury that the plaintiff is entitled to recover the amount which was due Laughlin at the time suit was brought, including compensation for bodily pain and mental anguish. In this appellant insists the court erred. In our opinion the instruction is right. The action was commenced by Laughlin. If he had survived till after the trial his bodily pain and mental suffering would have constituted proper elements of damage."

If in that case the Illinois Central R. R. Co. was held to make good the damages caused by mental suffering resulting from an injury received by Laughlin, why should not the Chicago & Northwestern R. R. Co. be held liable to make good the damage caused by mental suffering resulting from the outrage and indignity inflicted upon McKinlay?

162 Why was the mental suffering endured by Laughlin held to be an element of actual damages whilst the mental suffering endured by McKinlay is declared to be highly and purely speculative, imaginary, and exemplary?

III.

In Judge Cole's opinion, we find the conclusion he reaches upon this subject of damages stated as follows: "That pain of body may, upon the authorities, be classed among actual damages, but pain of mind or mental suffering can, if at all, be classed as actual damages only when such mental pain or suffering grows out of or is inseparably connected with the actual injury received."

This does not correctly state the law upon this point as we understand it, and as we shall presently endeavor to show, but even if it did, we do not think it follows that the court below erred in its charge to the jury on the subject of damages.

According to the foregoing statement, mental pain can be classed as actual damages when the same "grows out of or is inseparably connected with the actual injury received."

The jury were allowed by the court below to consider the "outrage and indignity" put upon plaintiff. In the first part of the opinion, Judge Cole holds that outrage and indignity means or includes damages for "mental pain and wounded feelings," and in the latter part of the opinion holds that these would constitute elements of actual damage, provided they grow out of or are inseparably connected with the actual injury received.

The outrage and indignities suffered by plaintiff consisted in being beaten, assaulted, threatened, vilified, abused, and subjected to treatment the most repulsive to all refined minds. Such treatment is an actual injury to the party aggrieved, and even under Judge Cole's ruling the mental pain caused thereby and inseparably connected therewith would constitute actual damages, and fully justify the charge of the district court.

163 The brakeman in charge of the car, whose duty it was to see that the passengers were properly and comfortably seated, instead of discharging this duty in a proper manner, unjustifiably refused to admit plaintiff to the seat he had already occupied and in which he had left his baggage, and upon plaintiff insisting upon his right to enter the car and occupy the seat, as he had a right to do, the brakeman brutally beat him and abused him, and after plaintiff had reached his seat followed him up with threats of further violence, and the use of foul and abusive language, and this line of treatment was approved and joined in by the conductor of the train. Did not such outrages and indignities necessarily cause pain of mind to plaintiff, which was inseparably connected with the actual injury received? Even if we are limited in these cases to the recovery of damages for mental pain that springs solely from the bodily hurts received, the case would still be within the rule laid by Judge Cole, because plaintiff did receive great bodily injuries, which of themselves caused great mental pain and anguish.

The true rule, however, is that plaintiff is entitled to recover damages

for the mental pain and anguish that naturally spring from the wrongful acts of the brakeman, for whose acts the defendant is responsible.

The assault and battery and abuse heaped upon plaintiff was a continuing wrong and trespass upon plaintiff, and he is entitled to be compensated for all the actual damages caused him thereby, which, according even to Judge Cole's rule, would include damages for the "mental pain growing out of and inseparably connected with the actual injury received."

In the case of Muldowney vs. I. C. R. R. Co., already referred to, this court, Judge Cole concurring, held that where two cars came together and crushed a brakeman he was entitled to recover damages for the mental pain caused to the injured party as actual damages. Why is it that in the present case Judge Cole holds that, although plaintiff has had collar-bone, shoulder-blade, and ribs crushed, besides suffering other outrages and dignities, he cannot recover damages for the mental
164 pain and anguish caused thereby, because such damages are highly and purely speculative? According to this ruling, if a car crushes a man's shoulder, the mental pain caused thereby is an element of actual damages; but if a brakeman crushes a man's shoulder with his fist, in violation of his duty, the mental pain caused thereby is not an element of actual, but wholly and purely of exemplary damages. These two rulings cannot be reconciled. One or the other must be held to be bad law, and it is due to the public, to the profession, and to the judges of the trial courts, that if the doctrine established in the Muldowney case is to be reversed, that it should be done openly and in express terms, so that parties litigant and the judges of the inferior courts may know what this court intends to hold upon *upon* this question.

Judge Cole seems to proceed upon the theory that the mind is not a part of a man's personalty; that if you cut off a man's arm, that is an actual loss, but that if you affect or destroy his mind, it would be damnum absque injuria.

Now it is a well-known fact that mental pain may injuriously affect not only the mind, but through it, what is ordinarily termed the bodily health.

In fact, if a man's arm is crushed, the bodily pain, so called, is felt or recognized by the brain or mind.

It is through the brain that bodily injuries usually produce their worst results in the shocks to the nervous system and weakening of the nervous powers. Now, if through the crushing of a man's arm a shock is caused to the mind, causing mental pain and anguish, and thereby injuring the nervous system, such a result would be held to constitute actual damages to the injured party.

Now suppose a brutal assault is made upon a person, causing great mental pain and anguish, and thereby seriously injuring the
165 nervous system and health of the person, are not such injuries as actual and real as in the former case? Is a party made whole under such circumstances, by being told, in the language of Judge Cole, that all such injuries and damages are "purely and highly speculative, imaginary, and exemplary"?

If the rule we contend for is not sustained, then we are left in this position. That in this State, a passenger in care of a common carrier can not recover damages for an assault, for being abused and villified in presence of others, and having his personal comfort and peace of mind destroyed, against either the carrier or the employee, who commits the

outrage on him, provided the abuse and assault stops short of an actual laying on of hands.

This conclusion follows from the proposition that outrage and indignities of the character described are not elements of actual damages but pertain to exemplary damages wholly.

In the case at bar we have sued the carrier for these, among other damages, but Judge Cole holds that they are not actual damages to plaintiff, and therefore he can not recover the same against the company. Now suppose we should sue the employee for these damages, in a case wherein as we have said, the brakeman had stopped short of actual violence to the body.

We could not sue the brakeman for breach of any contract to safely convey, for we had none with him.

The suit would be in tort for injuries inflicted.

The petition would set forth, that the defendant wrongfully assaulted and threatened plaintiff with personal violence, abused and vilified him in presence of others, thereby causing plaintiff great mental pain, anguish and discomfort.

Suppose a demurrer was interposed, on the ground that the alleged damages were not actual, and therefore not the basis of an action.

Now under Judge Cole's rule, the court would be obliged to hold that the alleged damages were not actual, but were purely and highly
166 speculative and exemplary. This would defeat plaintiff's case because to sustain an action, some ground of actual damages must be shown, and unless this is done, the court cannot let the question of exemplary damages go to the jury.

In dealing with this question of actual damages, reference is had to the effects or results caused to the party injured, not to the motive or malice of the wrong-doer. No amount of malice or wantoness on part of the perpetrator can change exemplary into actual damages, nor can the absence of malice change actual into exemplary damages.

The damages we are considering are mental pain and disquiet put upon plaintiff wrongfully. His actual injuries were fixed and determined at the time the outrage was inflicted, and such injuries cannot be called actual in a suit against the brakeman, and purely and highly exemplary, speculative, and imaginary in a suit against the carrier, who is liable for the bad conduct of the brakeman.

IV.

The closing sentence of Judge Cole's opinion is as follows:

"That 'outrage and indignity put upon one,' arise necessarily from the wilfullness, wantonness, gross negligence or oppressive manner in which the injury is inflicted, and belongs to that class of damages for which the servant alone is liable."

If, from the wilfullness, wantonness, gross negligence or oppressive manner in which the brakeman performed his duty as brakeman in charge of the car, there necessarily arose or was caused outrage and indignity to the passenger, these would be elements of actual damages for which the carrier would be responsible. The outrage and indignity so caused is an actual fact, for which the carrier is responsible.

The moment it is admitted that the wantonness and gross negligence of the brakeman were of such a character as to necessarily cause
167 outrage and indignity to the passenger, then it is shown that there are actual damages resulting from the wanton act of the brakeman, and in cases of this character, the carrier is liable for all the actual dam-

ages caused by the wanton or grossly negligent misconduct of his servant, whilst acting as his servant, within the scope of his employment. To hold otherwise, is to lay down the doctrine, that injuries which if inflicted without wanton'ess, or in the absence of gross negligence, would be actual damages to the sufferer, and would entitle him to recover against the carrier, if inflicted with malice would thereby be no longer actual damages, but would become highly speculative and exemplary. Such a doctrine carries its own refutation in the very statement of it.

V.

The court below instructed the jury that in this case the corporation could not be held liable for exemplary damages, because there was not evidence to show that the corporation had directed or ratified the act of the brakeman.

Plaintiff did not appeal therefrom, nor did defendant, except to this part of the charge, or assign error thereon. Hence the correctness of this ruling was not properly before this court. Upon the hearing, upon the reargument of the case at Dubuque, the counsel for plaintiff proposed to argue before the court the point that this was an error on the part of the court below, and that under the evidence the question of ratification should have been left to the jury. Judge Cole stopped the counsel, stating that the question was not before the court, and that if it were, he presumed the court would be agreed in holding that the question of ratification should go to the jury. This prevented all oral argument on this question, which we understood was not to be considered.

In the opinion filed we now find that Judge Cole attempts to sustain the instruction, affirming the same as being rightfully given, and then proceeding to state the rule of law to be that the ratification must be through the principal officers of the corporation.

168 It may be that it was not intended to thus forestall the ruling on this point before the question came fairly up or was fully discussed, but such would be the natural effect of the opinion if it is left as it is now written, a result unjust alike to this court, to the plaintiff, and to his counsel.

The evidence in this case shows that the brakeman beat and abused the plaintiff, a passenger, who was only insisting upon his just rights. The plaintiff complained of this ill-treatment to the superior officer of the brakeman, namely, to the conductor, the officer of the company specially charged with the management of the train and care of the passengers, and the immediate supervisor of the brakeman and other employés on the cars, and appealed to him for protection from such ill-treatment.

The conductor, in the presence of the other passengers, approved the conduct of the brakeman, stating that if he had been there, plaintiff should not have entered the car.

The conductor himself testified that he sent a statement of the case to the general superintendent.

The latter took no action thereon, and neither the conductor nor superintendent ever rebuked the brakeman, or in any manner censured him for his treatment of the plaintiff. That these facts tended to show a ratification of the acts of the brakeman, there can be no doubt, and under the authorities would be conclusive evidence thereof. If Judge Cole did not, in the opinion filed, intend to hold to the contrary, then the opinion as pronounced should be modified in this particular. If he in-

tends to approve the instruction as given, thereby cutting off plaintiff on a future trial, from submitting the question of ratification to a jury, then the ruling is a mere dictum, the point not being before the court. Moreover it is opposed to the weight of authorities, which can be readily shown, if opportunity is given to counsel to fully argue this point, and it is certainly unjust to plaintiff to thus hold, after stopping counsel from proceeding to show in argument before the court that the evidence in this case showed a ratification and should have been submitted to the jury.

169 The court below ruled, "There being no evidence in the case that the general officers of the defendant advised the wrongful act, or ratified it after it was done, this is not a case in which exemplary or punitive damages can be given."

Judge Cole states, "That if the corporation, through its principle officers, shall authorize, or approve, or ratify, etc.," then the corporation is liable. What is meant by general officers or principal officers? If the meaning is that ratification must be shown, by proving that the board of directors or the president and other like officials have ratified the act, it would be better at once to adopt the rule that the corporation never is liable for such acts, for these officers never act upon such questions.

The true rule upon this matter of ratification is to hold that if the officer specially charged with the duty of supervising and controlling the employee, whose wrongful acts are complained of, approves the act done, such approval is evidence of ratification.

The conductor has special charge of the train. The brakemen are under his control. He is the party to whom passengers have the right to appeal for protection whilst on the train. If he is appealled to in such a case, and expressly approves the conduct of the brakeman, is not this evidence of ratification by the company? In the case at bar, plaintiff appealled to the conductor. The latter approved the action of the brakeman. The conductor further submitted the matter to the superintendent for his action, but none was taken by him. Was not this evidence of ratification?

On this point see S't Louis A. & C. R. R. vs. Dally (19 Illinois, 368); Goddard vs. Grand Trunk R. R. (57 Maine, 202).

We do not propose to discuss this point, nor to cite the many authorities that can be found thereon, but simply wish to show the court that it is a point worthy of full discussion and consideration, before it is authoritatively passed upon, and that plaintiff's rights should not be prejudiced by an attempt to decide the point adversely to him, when it is not presented by the appeal, nor fully discussed in the argument.

170 The conclusion reached by Judge Cole in his opinion is that for outrage and indignity stopping short of an actual laying on of hands, inflicted upon a passenger by an employee of the carrier, the latter cannot be held responsible in damages. In other words, a passenger may be assaulted, vilified, abused, his peace of mind and personal comfort whilst on his journey may be destroyed, and may be degraded in the estimate of others, yet have no remedy against the common carrier therefor.

This may be the law, but if it is, it will become so simply because Judge Cole has so said, not because the doctrine is sustained by reason, principle, or authority. And we know of no reason why the Chicago & Northwestern R. R. Co. should be relieved from its obligation to make good to plaintiff the actual damages caused to him by the wrongful

and abusive acts of its brakeman and conductor, when to so relieve said company from such liability requires this court to reverse not only its own rulings heretofore made, but to announce a doctrine repugnant to common sense, and wholly opposed to every authority that can be found in the reports bearing on the question.

We doubtless have wearried the patience of the court by this lengthy argument for a rehearing, but we trust its length will not deter the court from giving thorough consideration to the questions involved, for if the ruling by Judge Cole is an erroneous one, as we are thoroughly satisfied it is, think of the additional wrong caused thereby to the plaintiff, in being subjected to the expense and great delay consequent upon a new trial, especially as the defendant now avows its intent to transfer the cause to the United States court, thereby delaying the final issue of the case for the next five or six years, to say nothing of the injury to the rights of other parties, caused by such error in the ruling upon the legal questions involved, as the principle thus described must be followed in other cases. We therefore respectfully ask the court to grant us a rehearing.

SHIRAS, VAN DUZEE & HENDERSON,
Attorneys for Appellee.

171 Appeal from district court of Linn County.

S. J. McKINLEY
vs.
CHICAGO AND NORTHWESTERN R. R. COMPANY.

The plaintiff in above cause being about to file a petition for rehearing in above cause, and having submitted the same to the undersigned at chambers, at Dubuque, Iowa, it is hereby ordered that the filing of said petition for a rehearing with the clerk of the supreme court shall suspend the decision in said cause until the next term of said supreme court.

AUSTIN ADAMS,
Judge of Supreme Court.

172 Now, on the 21st day of March, 1876, appellant files his motion to dismiss said petition for rehearing, in words and figures as follows, to wit:

In supreme court State of Iowa, March term, 1876. Appeal from Linn Co.

S. J. McKINLEY, APPELLEE,
vs.
THE C. AND N. W. R. CO., APP'L'T.

The appellant moves the court to dismiss the petition for rehearing filed by the appellee, because after the procedendo of this court was duly returned to the Linn dist. court a petition was duly filed by appellant to remove the cause to the U. S. court for trial, and the same was duly received and filed in said U. S. circuit court prior to the filing of the petition for rehearing.

Wherefore appellant says that the jurisdiction of the State, district,

and supreme court had ceased when the said petition was filed. Certificates of the facts stated are attached.

E. S. BAILEY AND N. W. HUBBARD,
Att'ys for Appellant.

173 United States circuit court, district of Iowa.

I, E. R. Mason, clerk of said court for said district, do hereby certify that on the 21st day of January, A. D. 1876, there was filed in my office at Des Moines, in said district, a transcript from the records of the district court of the State of Iowa, in and for Linn County, in a certain cause wherein Seymour J. McKinley is plaintiff and the Chicago and Northwestern Railway Company is defendant; that said cause was removed into the circuit court of the United States from said district court of Linn County under the provisions of the act of Congress entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes"; that the petition and bond for the removal of said cause, as aforesaid, is in due form of law as required by the provisions of said act above referred to.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this the 20th day of March, A. D. 1876.

[SEAL.] E. R. MASON, *Clerk.*

174 On this 26th day of April, 1876, appears the following record entry:

Appeal from Linn district court.

SEYMOUR J. McKINLEY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Co.

In this cause the court, being fully advised in the premises, overrule appellant's motion to dismiss appellee's petition for rehearing, and by order of this court said cause is set for argument in print at the next June term, at Des Moines, a rehearing having been granted.

And on the 16th day of June, 1876, the following record entry appears:

Appeal from Linn district court.

SEYMOUR J. McKINLEY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Co.

On motion *for* counsel for appellant, it is ordered that there be added nunc pro tunc to the record-entry overruling the motion of appell-
175 ant to dismiss the petition of appellee for rehearing at the Dubuque term in April, 1876, of this court, the following:

"And in the decision of said motion there was drawn in question a right of removal of said cause claimed by the appellant, the C. and N. W. R'y Co., under a statute of the United States, and the decision of

this court thereon was adverse to said right so claimed by said appellant, and that this writing upon the said motion is a final judgment; that this court has jurisdiction of said cause, and that the United States circuit court has not jurisdiction thereof."

176 And now, on the 19th day of June, 1876, the following petition for writ of error was filed, to wit:

In the supreme court, State of Iowa, June term, 1876.

THE CHICAGO AND NORTHWESTERN RAILWAY Company, pl'ff in error,
agt.
SEYMOUR J. MCKINLEY, DEF'T IN ERROR.

To the Hon. William H. Seevers, chief justice of the supreme court of Iowa:

Your petitioner, the Chicago and Northwestern Railway Company, respectfully states that at the October term, 1873, of the Linn County district court for the State of Iowa, there was tried a case then and there pending, wherein Seymour J. McKinlay was plaintiff and your petitioner was defendant, in which a verdict and judgment was then and there rendered in favor of said McKinley and against your
177 petitioner, in the sum of twelve thousand dollars and costs; that afterwards an appeal was perfected in said cause from said judgment to the supreme court of the State of Iowa, and the same was argued and submitted in said supreme court at the April term thereof, 1874, at Dubuque, Iowa; afterwards, and at the December term, 1875, of said supreme court, the opinion and judgment of said supreme court was duly announced and filed, as provided by law, reversing the judgment of the Linn County district court for errors therein, and on the 9th day of December, 1875, the said supreme court duly issued its procedendo remitting and remanding said cause to the said Linn County district court for further proceedings in accordance with its said opinion and judgment, namely, for a new trial thereof, which said procedendo was received by the clerk of said Linn County district court on the 12th day of December, 1875, and on that day by said clerk duly filed.

And petitioner avers that after the filing of said procedendo by
178 the clerk of the said Linn county district court, the said cause was then duly pending in that court for retrial, and that afterward and on the 15th day of December, 1875, and while the said cause was so still pending for trial in said district court, your petitioner filed its petition in said clerk's office of said district court, and also its bond in the penal sum of one thousand dollars with good and sufficient surety, both in all respects in accordance with the act of Congress, approved M'ch 3d, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts and for other purposes," asking for the removal of said cause into the next circuit court of the United States for the district of Iowa for trial; and in pursuance thereof your petitioner afterwards, to wit, on the 21st day of January, A. D. 1876, procured from the clerk of said district court a duly certified copy of the record in said cause in all respects in accordance with the act of Congress aforesaid, and on that day caused the same to be filed in the office
179 of the clerk of the circuit court of the United States for the dis-

trict of Iowa, whereby all jurisdiction over said cause by the State courts for the State of Iowa ceased and determined.

Your petitioner further states that afterwards and on the 2d day of February, 1876, the said McKinlay, by his attorneys, Shiras, Van Duzee and Henderson, filed in the supreme court of Iowa his petition for a rehearing of said cause, and obtained from his Hon. Austin Adams, one of the judges of the supreme court of Iowa, an order recalling the said procedendo of the supreme court, and suspending further proceedings thereunder; afterwards, and at the March term of the said supreme court, your petitioner appeared therein by counsel, and filed therein its motion to dismiss the said petition, for the reason that said supreme court had no further jurisdiction of said cause, inasmuch as the same had been duly removed from the Linn County district court, while then pending for retrial, into the United States circuit court for
the district of Iowa for trial as hereinbefore stated, which said
180 motion, after argument and due consideration, was afterward and
on the day of April, 1876, denied and overruled by said supreme court, and a rehearing of said cause granted as prayed by the said McKinley, and your petitioner was then and there duly ordered by said supreme court to file an answer and reply to the petition and argument of said McKinley at the June term of said court at Des Moines, to all which ruling upon said motion, and the overruling and denial thereof, and the granting of said rehearing and the decision that said supreme court still had and entertained jurisdiction of said cause, your petitioner then and there duly excepted at the time.

And your petitioner says the' by and in the decision of said motion to dismiss said petition for a rehearing as aforesaid there was drawn in question the right of your petitioner to remove said cause from the said Linn County district court to the circuit court of the United States for
the district of Iowa, under and by virtue of the act of Congress
181 of March, 1875, heretofore mentioned, and also the right of your
petitioner under said act of Congress, and the said supreme court of Iowa decided adversely to the right claimed by your petitioner under said statute of the United States, and that said supreme court is the highest court of said State of Iowa in which a decision can be had upon said motion and in said cause.

And your petitioner further states that the decision of said supreme court is final as to the jurisdiction of said court over said cause, and not an interlocutory order made therein.

Wherefore petitioner now here brings its supersedeas bond in the sum of thirty thousand dollars, with good and sufficient surety, and prays that a writ of error be granted, directed to the supreme court of the State of Iowa, commanding that the record in said cause be certified to the Supreme Court of the United States, and that a citation issue as
provided by law, and that a stay of proceedings be ordered until
182 the said errors shall have been heard and determined.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
By U. M. HUBBARD, *Att'y.*

A writ of error is allowed as prayed for in the foregoing petition, June 19, 1876.

W. H. SEEVERS,
Ch. J. Supreme Court of Iowa.

183 Also appear the following writs of error and bond, filed June 19, '76.

184 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Iowa, before you, being the highest court of law or equity in the said State in which decision could be had in the suit between the Chicago and Northwestern Railway Company, pl'iffs in error, vs. Seymour J. McKinlay, defendant in error, wherein was drawn in question the construction of the act of Congress, approved March 3d, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity
185 by the said supreme court of Iowa, and the validity of said act; or wherein was drawn in question the validity of a statute or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of an act of Congress or of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Chicago, Northwestern Railway Company as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things
186 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said supreme court to be then and there held, that the records and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, 19th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD R. MASON,
Clerk U. S. C. C. Dist. of Iowa.

Allowed by—

W. H. SEEVERS,
Ch. J. Supreme Court of Iowa.

187 Know all men by these presents that we, The Chicago and Northwestern Railway Company as principal, and John Weare as security, are held and firmly bound unto Seymour J. McKinlay, in the full and just sum of thirty thousand dollars, to be paid to the said Seymour J. McKinley, his certain attorney, executors, administrators, and assigns, to which payment well and truly to be made we bind our-

selves, our heirs, executors, administrators, and assigns, jointly and severally by these presents, sealed with our seals and dated this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-six (1876).

Whereas, lately, at a term of the supreme court of the State of Iowa, in a suit depending in said court between Seymour J. McKinlay, plaintiff and appellee, and The Chicago and Northwestern Railway Company, defendant and appellant, was rendered against said The Chicago and Northwestern Railway Company a final judgment denying and overruling a motion to dismiss the petition for a rehearing filed
188 in the said supreme court, for the reason that the said supreme court of Iowa had no jurisdiction of said cause to rehear the same or take any further action or jurisdiction thereof, and the said The Chicago and Northwestern Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said State supreme court to reverse the judgment on said motion in the aforesaid suit, and a citation directed to the said Seymour J. McKinlay, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of October next:

Now, the condition of the above obligation is such that if the said The Chicago and Northwestern Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, [SEAL.]
By N. M. HUBBARD, *Its Att'y.*
JOHN WEARE, *Security.* [SEAL.]

189 STATE OF IOWA,
Linn County, ss:

I, John Weare, being duly sworn, on oath say that I am a resident of the State of Iowa; that I am worth sixty thousand dollars beyond the amount of my debts, and have property liable to execution in this State equal to the amount above stated.

JOHN WEARE.

Subscribed and sworn to before me and in my presence this 14th June, 1876, by John Weare.

Witness my hand and notarial seal.

[SEAL.] JOHN F. DEAN,
Notary Public.

The bond approved by me to operate as a supersedeas this 19th day of June, 1876.

W. H. SEEVERS.
Ch. J. Supreme Court of Iowa.

190 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Seymour J. McKinlay:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, in & for the State of Iowa, wherein The Chicago & Northwestern Railway Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States this 19th day of June, 1876.

W. H. SEEVERS,
Ch. J. Supreme Court of Iowa.

Service of within citation acknowledged, with copy at Dubuque, June 24th, 1876.

SHIRAS VAN DUZEE & HENDERSON,
Att'ys for S. J. McKinlay.

191 Supreme court of Iowa.

I, E. J. Holmes, clerk of the supreme court of the State of Iowa, do hereby certify the foregoing to be true, full, and complete copies of appellant's abstract of record, record entry of submission, record entry of reversal, the procedendo from supreme court with date of endorsement of filing by clerk of court below, petition and bond to remove cause to the United States circuit court, the petition for rehearing, the order suspending proceedings, the motion to dismiss petition for rehearing, the record entry overruling motion to dismiss the petition for rehearing, the petition for writ of error, the writs of error and bond, and the original citation, as full and complete as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme court of Iowa, at my office in Des Moines, this 24th day of July, A. D. 1876.

[SEAL.]

E. J. HOLMES,
Clerk Supr'm' Court of Iowa.

192 In Supreme Court United States.

SEYMOUR J. McKINLEY, DEF'T IN ERROR,
ag't
THE CHICAGO & NORTHWESTERN RAILWAY Company, pl'ffs in error.

It is agreed that the further record certified by clerk of supreme court of Iowa in Nov., 1876, to Supreme Court of the United States in above cause, shall be filed as further record in case No. 692 now pending in Supreme Court of the United States, wherein the parties above named are parties.

N. M. HUBBARD,
Att'y for Def't.
SHIRAS, VAN DUZEE & HENDERSON,
Att'ys for Pl'ff.

Filed 22 December, 1876.

(Indorsed:) U. S. Sup. Court. McKinley v. The C. & N. W. R'y Co.

193 Supreme court of Iowa.

Hons. W'm H. Seevers, chief justice; James G. Day, James H. Rothrock, Joseph M. Beck, Austin Adams, justices; E. J. Holmes, clerk.

Appeal from Linn district court.

SEYMOUR J. McKINLAY
vs.
CHICAGO AND NORTHWESTERN R'Y CO., app'l't.

Be it remembered that heretofore, to wit, at the October term of said supreme court, begun and held at the city of Dubuque on Monday, the 16th day of October, A. D. 1876, the following proceedings were had, to wit:

194 Supreme court. Oct. term, 1876.

Appeal from Linn district court.

S. J. McKINLAY
vs.
THE CHICAGO AND NORTHWESTERN R'Y CO., app'l't.

OCT. 17TH, 1876.

This action is brought to recover damages for an alleged injury caused by a beating and forcible resistance of the plaintiff by a brakeman of the defendant, when the plaintiff was about to enter a passenger-car of the defendant's at Harvard Junction, Wisconsin, on March 22d, 1872. Upon a general issue as to the facts alleged by plaintiff, and the liability of defendant, the cause was tried to a jury, who found a verdict for the plaintiff in the sum of twelve thousand dollars. A judgment was rendered thereon, from which the defendant appeals.

E. S. Bailey and N. M. Hubbard for app'l't.

Shiras, Van Duzee and Henderson, and Thompson and Davis for appellee.

195 SEEVERS, Ch. J.:

A rehearing having been granted and the questions involved having been again argued with great ability and research, it becomes our duty to re examine and determine the questions presented.

I. At the appearance term, November, 1872, the defendant moved to suppress the depositions of certain witnesses because the certificate of the officer taking them did not show that the same were read over to the witnesses by him before the same were signed and sworn to; and because it did not state whether either party, his attorney or agent, was present at the taking. This motion was not called up for determination until the following March term of the court. In the mean time, and on January 20, 1873, the officer taking the depositions sent to the clerk of the court a further and additional certificate made as required by law and showing that said depositions were properly taken. The court overruled the motion, and hereon arises the first question in order. We see no reason why the officer taking a deposition may not amend his certificate according to the facts; and when, as in this case, there is no showing or complaint but that the amended certificate truly states the facts

196 connected with the taking of such depositions, the court may accept the same as true. This being so, it follows that there was no error in overruling the motion.

II. The next question arises upon the giving and refusing to give instructions. The evidence is too voluminous to give, even in a summary, and it will be sufficient to state that there was testimony to justify the giving of the instructions asked, if they correctly state the law. The leading facts are that the plaintiff is a citizen of Iowa, and in March, 1872, purchased of defendant a ticket in Chicago, from there to Beloit; that a change of cars became necessary at Harvard Junction; the plaintiff undertook to enter the rear car of the defendant's train, upon which he was to continue his journey, and a brakeman of the defendant was at the door, charged with that duty, and refused admission to plaintiff on the ground that the rear car was for ladies, and for gentlemen accompanied with ladies, and directed him to the next car forward. The plaintiff insisted upon entering the rear car, and a rencounter there occurred between the plaintiff and the brakeman. The testimony respecting the contest between them and the extent of the injury the
197 plaintiff received is very conflicting and wholly irreconcilable.

The defendant asked, among others, the first instruction following, which was refused, and the court gave, on its own motion, the next instruction following, to each of which the defendant duly excepted, and now assigns such refusal and giving as error.

"1. A railroad company is not responsible for the criminal or willful acts of its agents or servants. It is only answerable for their negligent and careless acts done or omitted in the course of the performance of their duties. Therefore if you find from the testimony in this case that the brakeman assaulted plaintiff and inflicted the injuries complained of, such acts are criminal and willful, and plaintiff cannot recover in this action unless it is shown that defendant authorized the act or approved it afterward. There is no proof of any authority from defendant to assault or injure plaintiff, and no ratification of the brakeman's act."

"4. Much has been said in the argument to the court as to the liability of the company for the alleged wrongful and criminal assault and battery by the brakeman. You are instructed that if the plaintiff attempted to re-enter the car, and was without fault on his part,
198 as hereinafter explained, and the brakeman with the intent and purpose to prevent him from re-entering the car for the reason that it was not intended for gentlemen unaccompanied by ladies, violently assaulted and injured the plaintiff and was guilty of a criminal act in so doing, the defendant is liable for such injury, and the fact, if so it is, that the brakeman used such force and violence as to render himself criminally liable does not exonerate the defendant. In other words, if the brakeman in executing what he supposed to be his orders used force and violence, when his orders did not contemplate such means, the company is liable for such injuries as his violence occasions."

The district court, by refusing the first of the above instructions, denied that a railroad company could not be liable for the acts of an employé, when done willfully, so as to constitute a crime; and by giving the last affirmed that it would be liable for even the willful criminal acts of its employés when done in the course of their employment. It was held by this court in DeCamps vs. The M. and M. R. Co., 12 Iowa, 348, and also in Cook vs. The Ill. Cent. R. Co., 30 Iowa, 202, each of which cases was brought to recover damages for running over stock
199 on the track of the defendant's railroad, that "a railroad company is not responsible for the criminal or willful acts of its agents

or servants." The first case does not state the facts upon which the doctrine was announced; while in the second it was expressly found by the jury that the act of the engineer in charge of the engine which struck the colt was intentional and willful.

In the absence of such showing and where the willfulness of the act affirmatively appears, the doctrine announced is probably correct, and we do not desire to be understood as affirming or disaffirming it, for the reason it is unnecessary to do so.

In each of these cases the injury was done to stock respecting which neither the railroad company or its employees were under any obligations of positive or affirmative duty, while in the case of passengers such duty does exist. These cases therefore do not settle the doctrine nor apply to the case now before us.

If we were left to determine the question upon principle, whether an employer should be held liable for the wilful or criminal acts of the employee done in the course of his employment, we should have
200 very little or no hesitation in affirming such liability. And this because the employer has placed the employee in a position to do wrong, and it being done in the course of his employment, the intent with which it was done should not affect the liability of the employer; whether the intent of the employer is good or ill, so long as he acts within the scope of his employment the employer should be bound.

The decided weight and number of the authorities are in accord with this view. We need only refer to some of them without stopping to discuss or review them. See Turner v. North Branch R. R. Co. (4 Cal., 494); Great Western R. R. vs. Miller (19 Mich., 305); Fenney v. C. R. and R. Co. (10 Wis., 395); Brooks vs. Penn. Cent. R. R. (57 Penn. St., 339); S't Louis and Alton R. R. Co. vs. Dalby (19 Ill., 353); Little Miami R. R. vs. Witmore (19 Ohio, 110); Isaacs vs. Third Avenue R. R. (47 N. Y., 122); Goddard vs. Grand Trunk R. R. (57 Maine, 212); Rich vs. Bryant (106 Mass., 180); Cracker vs. C. and N. W. R. R. (36 Wis., 657).

III. There were other instructions asked and refused, and errors assigned thereon, but in our view the instructions given fairly cover the grounds of those refused, and we do not deem it necessary to set them out in full or to review the criticism of counsel upon them.

201 IV. Upon the question of damages the court gave the following instruction:

"9. If, in the light of the foregoing instructions, you find from the evidence that the plaintiff is entitled to recover, the next question is as to the measure of damages to which the plaintiff is entitled. There being no evidence in the case that the general officers of the defendant advised the wrongful act, or ratified it after it was done, this is not a case where exemplary or punitive damages can be allowed. The principal cannot be punished by awarding exemplary damages against him for the willful, wrongful, or malicious act of his agent or servant, unless the wrongful act was done by the direction of the principal or was afterwards ratified by him. The extent of the damages in such cases is what the law calls compensatory. Compensatory damages embrace the reasonable expenses incurred by the plaintiff, if any, in curing or endeavoring to cure the injuries he received; also, the damages suffered, if any, from the loss of time and inability to attend to business, resulting from the injuries received; also the bodily pain and suffering, if any, resulting from the injuries received, and for the outrage and
202 indignity put upon him, and if you find from the evidence that the plaintiff has not yet recovered from the injuries received, or if

you find that the injuries are permanent, you should add such damages as you believe, from the testimony, it is fair to infer the plaintiff will suffer in the future. Taking all these elements into consideration, you will ascertain the amount of damages suffered by the plaintiff. He should be fully compensated. There has been much testimony as to the character and extent of the plaintiff's injuries, and surgical experts have been examined on this question; this evidence is entitled to your consideration, and it is for you to determine therefrom as well as from the other evidence in the case, how great the injuries were and whether they are permanent or not."

No exception was taken to so much of the foregoing instruction as announces the doctrine that exemplary damages cannot be recovered in actions of this character and therefore that question is not before us. The specific objection urged is that the use of the words "and for the outrage and indignity put upon him" constitutes error. The instruction recognizes the rule that there may be a recovery for "bodily pain and suffering," but it does not recognize there may be a recovery for
203 "mental anguish" unless "outrage and indignity" includes mental pain. That "mental anguish" caused solely by the injury inflicted is an element of compensatory damages is not vigorously contested by counsel, and such doctrine is clearly recognized in Muldowney vs. Ill. Cent. R. R. Co., 36 Iowa, 462. That case does not recognize any difference between mental anguish caused by the injury and such as may arise from the manner in which the assault was committed or the outrage and indignity caused. But as the case before the court did not call for the expression of an opinion on the latter proposition, it is fair to presume it was only intended to refer to and cover the former.

We are unable to see that Hendrickson vs. Kingsbury (21 Iowa, 379) has any bearing whatever on the question presented in the present case.

The foregoing are the only cases determined by this court which have been cited by counsel as bearing on the question before us.

If the instruction only means by the terms "outrage and indignity" mental anguish caused by the injury, then it would not be erroneous under the rule laid down in the Muldowney case, and in Canning vs. Inh. of Williamstown (1 Cush., 451); Penn. and Ohio Canal Co.
204 vs. Graham, 63 Penn. St., 290.

"Outrage and indignity" as used in the instruction must mean and include mental anguish or pain as distinguished from bodily suffering, and as a recovery is not confined to such mental pain as arises from or is caused by the injury inflicted, the question is fairly presented whether mental anguish, arising from the nature and character of the assault, constitutes an element of compensatory damages. The appellant insists that such mental pain is not an element of compensatory damages, but concedes it may be considered in a case proper for the assessment of exemplary damages. As we have seen, mental anguish arising from the injury, that is, pain caused by the wound or broken arm, constitutes an element of compensatory damages, and we, on principle, are unable to see why mental pain, arising from or caused by the nature and character of the assault whereby the wound was inflicted or arm broken, should not also be an element of such damages. The one is as easy estimated and determined as the other, and, practically, the two cannot be separated or distinguished. The party injured cannot
205 tell where one ends and the other begins. The value or damage arising from either or both cannot be accurately computed, and from the nature of things they are so blended together they cannot be separated or distinguished. The attempt, therefore, to draw a line or

make a distinction between the two and assign one to the class of exemplary and the other compensatory is futile, and cannot be done.

The distinction is too fine to serve any practical purpose in the determination of causes by courts and juries.

A careful examination of the authorities will disclose the fact that the weight of adjudicated cases is in favor of the proposition that mental anguish, arising from the nature and character of the assault, is an element of compensatory damages. It was so held in Smith vs. R. R. Co. (23 Ohio St., 10), and Flagg vs. R. R. Co. (43 Ill., 365), both being cases of expulsion from cars, and in Smith vs. Holcomb (99 Mass., 552), an action for assault and battery, it was held that "insult and indignity inflicted upon the plaintiff by reason of the blows given by defendant" should be taken into consideration in assessing the damages, nothing being said as to exemplary damages.

206 In Meagher v. Driscoll (99 Mass., 281), it was held in an action for trespass on real estate and removing the body of the plaintiff's deceased child therefrom, that injury to the feelings of the plaintiff might be considered in assessing the damages. There can be no pretence there was either fraud, malice, negligence, wantonness, or intended wrong in the case.

In an action to recover damages for injuries suffered by reason of a defective bridge the jury were directed in assessing damages to take into consideration the peril, danger, and suspense to which the plaintiff was exposed, and the Supreme Court approved the charge, and added that actual injury is not confined to the wounds and bruises upon the body, but extends to mental suffering. The mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Seiger vs. Town of Barkmanstead (22 Conn., 98), and see Masters vs. Town of Warren (27 Conn., 300); Lawrence vs. Housatonic R. R. Co. (29 Conn., 390); Taber v. Houston (5 Ind., 322); Cox vs. Vanderklied (21 Ind. 164.)

The late case of Cracker vs. C. U. W. R. R. Co. (36 Wis., 657) is directly in point. In that case the conductor, by the use of some
207 force, kissed the plaintiff, a female passenger. The defendant discharged the conductor and done what it could to show his conduct was disapproved. The jury assessed the damages at one thousand dollars, and the verdict was sustained, on the ground that it was right and proper to take into consideration the insult to the plaintiff's wounded and outraged feelings, and it was expressly held that exemplary damages were not recoverable in such action.

No adjudicated case has been cited by counsel for the appellant in which the distinction claimed to exist, and which we have been discussing, has been recognized or expressly adopted except Johnson vs. Wells, Fargo & Co. (6 Nev., 224); and believing the decided weight of authority is opposed to the view taken in that case, we are unwilling to follow it and, by so doing, ignore the other authorities cited.

V. It is urged that the damages are excessive and "appear to have been given under the influence of passion or prejudice." The actual injuries received, including loss of time and expense incurred, while considerable, will not warrant the amount found by the jury.

It is difficult to estimate the amount of the recovery for pain
208 and suffering either of body or mind, and we have rarely interfered with verdicts of this character. Each case, however, must be governed and controlled by the particular facts and circumstances.

No general rule applicable to all cases can be adopted unless it be that, whatever the verdict may be, it must stand and cannot be in any

manner disturbed however much it may strike the mind as having been given under the influence of "passion or prejudice," and certainly no such rule as this will for a moment be insisted on.

An examination of the testimony in this case satisfies us that the amount allowed by the jury is greatly in excess of what it should have been and that the amount of the verdict is the result of "passion or prejudice." So feeling, we should be derelect in our duty, beside disregarding the provision of the statute, if we declined to interfere.

If the plaintiff within thirty days from the filing of this opinion sees proper to accept a judgment for seven thousand dollars, there will be an affirmance and judgment entered here otherwise; there must be a reversal.

Justice Beck does not concur in the conclusion reached as to
209 the reduction of the verdict, on the ground that he does not think the verdict indicates either passion or prejudice.

DAY, J., dissenting:

I do not concur in so much of the foregoing opinion as holds that outrage and indignity resulting in mental suffering constitute an element of compensatory damage. In my opinion, mental suffering arising from such cause should be considered only when the circumstances are such as to warrant exemplary damages. I have neither time nor inclination to set forth my views upon this question; nor, as my brothers all entertain a different view, would any practical purpose be subserved by doing so. There is a conflict of authority upon the subject. None of the cases cited in the foregoing opinion discuss the question elaborately or sustain the view maintained with any great cogency of reasoning. Most of them merely announce it ex cathedra. I think the better doctrine is that maintained by the supreme court of Nevada in Johnson vs. Wells, Fargo and Co. (6 Nevada, 224), and followed by a majority of this court upon the former hearing.

210 And on the 23d day of October, 1876, the pl't'ff filed his remittiter in words and figures as follows, to wit:

SEYMOUR J. McKINLAY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Co., appe'l't.

Now comes the pl't'ff and hereby consents that the amount of damages may be reduced to seven thousand dollars, as provided in the opinion filed in said cause.

S. J. McKINLAY,
By SHIRAS, VAN DUZEE AND HENDERSON,
His Attorneys.

211 And on the 23d day of October, 1874, appears the following record entry:

SEYMOUR J. McKINLAY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Co., app'l't.

In this cause, it appearing that the plaintiff, Seymour J. McKinlay, has filed a remittitur in said cause, consenting to a reduction in the ver-

dict of the jury assessing the damages from $12,000 to $7,000, and now moves for judgment in this court in accordance with the opinion of this court heretofore filed in said cause; it is therefore ordered and adjudged by the court that plaintiff have and recover judgment against the defendant, The Chicago and Northwestern Railway Company, for the sum of seven thousand dollars, with interest thereon at six per cent., and for costs of suit, taxed at , and that plaintiff have execution therefor.

To the rendering and entering of which said judgment the counsel for appellant, the C. and N. W. R'y Co. in due time and manner objected, claiming that under the acts of Congress authorizing the removal
212 of causes from the State to the Federal court this cause had been duly removed to the circuit court of the U. States for Iowa, from the district court of Linn County, when and while the same was pending therein, after the issuance and filing there of the procedendo herein, under and according to the original opinion announced at the December term, 1875, and that under said acts of Congress and the removal so taken, the appellant had the right to have said cause tried in the Federal courts; but the court overruled said objections, holding that it had jurisdiction to render the judgment, thereby denying that appellant had removed said cause to the U. S. circuit court under the acts of Congress of the U. S. providing for the right of removal of causes from the State to the Federal courts, as claimed in its behalf.

To all which the appellant, by its counsel, duly excepted.

213 And on the 24th day of October, 1876, appears the following record entry:

SEYMOUR J. McKINLAY
vs.
CHICAGO AND NORTHWESTERN R'Y CO. AP'L'T. } Substituted record entry.

This day this cause coming before the court upon motion of appellee to strike from the records of this court the nunc pro tunc record entry made at the June term, 1876, of this court, and to substitute a proper entry in place thereof, upon consideration, said motion is granted, and it is ordered by the court that the said nunc pro tunc entry made at the June term, 1876, be set aside, and that in lieu thereof be substituted the following, the same to be taken and read as the complete record of the action of the court upon appellant's motion to dismiss the petition for rehearing:

S. J. McKINLAY
vs.
C. AND N. W. R'Y CO.

This cause coming up before the court upon a motion filed by appellant, the Chicago and Northwestern Railway Company, to dismiss the petition for rehearing filed by the appellee, and it appearing to the court that at the December term, 1875, of this court, an opinion
214 had been filed in this court reversing the judgment of the district court of Linn County in said cause, said opinion being filed on the 8th day of December, and that a procedendo in the usual form had been issued by the clerk of this court to the district court of Linn County, the same bearing date Dec. 9, 1875, and that the same was filed in said district court of Linn County on the 15th day of Dec., 1875.

That on the 15th day of Dec., 1875, the appellant filed a petition, affidavit, and bond for the removal of said cause to the United States circuit court for Iowa, in the clerk's office of the district court of Linn County, and on the 21st day of January, 1876, filed certified copies of the pleadings and papers in said cause in the United States circuit court for Iowa. That on the 2d day of Feb'y, 1876, the appellee filed a petition for a rehearing in this court, and obtained an order from the Hon. Austin Adams, one of the judges of this court, suspending the decision of this court, as provided for in section 3201 of the code of Iowa. That thereupon the appellant filed this motion to dismiss the petition for rehearing on the grounds:

215 Appeal from Linn Co.

S. J. McKINLAY
vs.
C. AND N. W. R'Y CO. APP'L'T.

The appellant moves the court to dismiss the petition for rehearing filed by the appellee, because after the procedendo of this court was duly returned to the Linn dis't court, a petition was duly filed by appellant to remove the cause to the U. S. court for trial, and the same was duly removed and filed in said U. S. C. court prior to the filing of the petition for rehearing.

Wherefore appellant says that the jurisdiction of the State district and supreme court had ceased when the said petition was filed. Certificates of the facts stated are attached.

E. S. BAILEY AND
N. M. HUBBARD,
Att'ys for App'lt.

And now on this day, this court having heard counsel, and having duly considered said motion to dismiss the petition for rehearing, overrule said motion to dismiss, holding—

216 Supreme court, April term, 1875. Appeal from Linn district court.

S. J. McKINLAY
vs.
C. AND N. W. R. CO.

By the court:

On appeal the judgment of the court below was reversed. Within a day or two thereafter a procedendo was issued by the clerk, directing the court to proceed with the case in accordance with the opinion of this court, whereupon the defendant filed a petition and bond in the court below, in strict accordance with the act of Congress passed in 1875, to remove the cause to the circuit court of the United States. Afterwards the plaintiff filed a petition for rehearing, whereupon the defendant filed a motion to dismiss the cause.

The code provides as follows: "If a petition for rehearing be filed, the same shall suspend the decision if the court, on its presentation, or one or more of the judges, if in vacation, shall so order, in either of which case such decision shall be suspended until the next term."

217 Sec. 3201.

Such order as contemplated in the preceding section was made.

The rules of this court provide that petitions for a rehearing must be filed within sixty days after the decision was made.

At the time the procedendo was issued and the petition and bonds for the transfer to the circuit court of the United States was filed in the court below, and also at the time the transcript was filed in said circuit court, no petition for a rehearing had been filed, but such petition was filed and was pending at the time the motion to dismiss was made. And the question now is whether the proceedings aforesaid have deprived this court of power to proceed farther in the case. As we understand the act of Congress, no cause can be transferred to the circuit court of the United States while the cause is pending in the courts of last resort in the several States. Inasmuch as the petition for a rehearing was filed in 60 days from the decision, we hold that the cause was still pend-
218 ing here, and the motion must be overruled, the court holding that the proceedings taken by appellant in the district court of Linn County for the removal of the cause to the United States circuit court did not affect the jurisdiction of this court, which still continued for the purposes of the rehearing, thereby denying that appellant had removed said cause to the United States court under the acts of Congress of the U. S. providing for the right of removal of causes from the State to the Federal courts, as claimed on its behalf.

It is therefore ordered that said motion to dismiss the petition for rehearing be overruled at cost of appellant, taxed at $.

To which ruling, judgment, and decision the appellant at the time duly excepted.

And now, on the 20th day of November, 1874, the appellant, by his attorney, files the following petition for writ of error to United States Supreme Court:

219 THE CHICAGO AND NORTHWESTERN RAILway Co., pl'ff in error, *ag't* SEYMOUR J. MCKINLAY, DEF'T IN ERROR. } Oct. T., 1876.

To the Hon. W'm H. Seevers, chief justice of the supreme court of Iowa:

Your petitioner, the Chicago and Northwestern Railway Company, respectfully states that in the cause of Seymour J. McKinlay, appellee and plaintiff, against the Chicago and Northwestern Railway Company, appellant and defendant, claimed to be pending in the supreme court for Iowa, at the June term, 1876, on rehearing, the defendant, the Chicago and Northwestern R'y Company, on the 19th day of June, 1876, filed its petition for a writ of error in said cause to the Supreme Court of the United States, which petition was on that day duly allowed by your honor, and also a writ of error in due form was allowed by your honor, and a supersedeas duly approved; afterward, and on the 19th day of June, 1876, a certiorari was duly served upon the defendant in error in said writ, the said Seymour J. McKinlay, to appear at October term,
220 1876, of the Supreme Court of the United States at Washington, to answer the same; that afterwards, and on the 1st day of August, 1876, a certified record of all the records and proceedings in said cause, in due form, was transmitted by the clerk of the supreme court of Iowa to the clerk of the Supreme Court of the United States, and said cause was, on the day of , 1876, duly filed and docketed in the said Supreme Court of the United States, and numbered case 692, and is now pending and undetermined in said court.

And your petitioner further states that afterwards, and at the October term, 1876, of the supreme court of Iowa, at the Dubuque term, and on the 17th day of October, 1876, an opinion and decision was duly filed in the said cause*d* claimed to be then pending, whereby the judgment of the district court was affirmed upon condition that the said McKinlay, pl'ff, would consent to enter a remittitur and consent to accept the sum of seven thousand dollars instead of twelve thousand dollars found by the jury, and also that an order be entered for judgment in the said supreme court for the said sum of seven thousand dollars upon the final of such remittitur*e*. Afterward, and on the 23d day of Oct., 1876, the said McKinlay filed said remittitur*e* and consented to accept the
221 said sum of seven thousand dollars and costs; and therefore, on that day, a judgment was entered by said supreme court against the Chicago and Northwestern Railway Company and in favor of the said McKinlay for the sum of seven thousand dollars, and costs taxed at $408.06 dollars; to all which proceedings and the rendition of said judgment the said The Chicago and Northwestern Railway Company duly excepted at the time.

Petitioner further says that at the said October term, 1876, the defendant in error, McKinlay, filed a certain motion in writing in said supreme court of Iowa to vacate the nunc pro tunc order entered at the June term, 1876, upon motion of the Chicago and Northwestern Railway Company, and to substitute a record-entry in lieu thereof, as shown by the records of this court; that afterwards, and on the 24th day of October, 1876, the said motion was granted and the substituted record-entry prayed was entered upon the records of this court, as shown by said records; to all which the Chicago and Northwestern Railway Company duly excepted at the time.

And your petitioner further states that the overruling of the motion to dismiss the petition for rehearing filed by the said McKinlay, as
222 formerly certified, was final as to the jurisdiction of the supreme court of Iowa, and not an interlocutory order, and that the judgment for the sum of seven thousand dollars above mentioned is a final judgment in said cause, and rendered by the highest judicial tribunal in the State of Iowa in which a decision can be had in said cause upon the matters adjudicated and decided.

And petitioner further states that upon the overruling of the motion of the Chicago and Northwestern Railway Company to dismiss the petition of said McKinlay for a rehearing (at the April term, Dubuque, 1876, as heretofore certified), and upon the final decision and rendition of the judgment at the Oct. term, 1876, as above mentioned, the supreme court held that the proceedings taken by appellee in the district court of Linn County for the removal of the cause to the United States circuit court did not affect the jurisdiction of this court, which still continued for the purpose of the rehearing, thereby denying that appellant had removed said cause to the United States court, under the act of Congress of the U. S. providing for the right of removal of causes from the State to the Federal court, as claimed on its behalf.

Wherefore, petitioner now here brings its supersedeas bond in
223 the sum of twenty thousand dollars, with good and sufficient surety, and prays that a writ of error be granted directed to the supreme court of Iowa, commanding that the record, or so much thereof as has not already been certified in said cause, be certified to the Supreme Court of the United States, and that citation issue as provided by law, and that a stay of proceedings in this court be ordered until the

said alleged errors shall have been first heard and determined by the Supreme Court of the United States.

THE CHICAGO AND NORTHWESTERN R'Y CO.,
By N. M. HUBBARD, *Attorney.*

Upon presentation of the foregoing petition, together with the supersedeas bond, ordered that a writ of error issue as prayed, and that a stay of proceedings be granted as prayed, upon filing with the clerk of this court the supersedeas bond this day approved by me.

W. H. SEEVERS,
Ch. J. Supreme Court of Iowa.

224 Also appears the following bond:

Supersedeas bond.

Know all men by these presents that we, the Chicago and Northwestern Railway Co., principal, and John Weare and Charles Weare, sureties, are held and firmly bound unto S. J. McKinlay in the full and just sum of twenty thousand dollars, to be paid to said S. J. McKinlay, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 4th day of Nov., in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a term of the supreme of the State of Iowa, in a suit depending in said court between S. J. McKinlay, plaintiff, and the Chicago and Northwestern Railway Company, defendant, judgment was rendered against the said Chicago and Northwestern Railway Company, and the said Chicago and Northwestern Railway Company having obtained a writ of error to the Supreme Court of the United States,
225 and filed a copy thereof in the clerk's office of the said supreme court of Iowa, to reverse the decision and judgment in the aforesaid suit, and a citation directed to the said S. J. McKinley, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Chicago and Northwestern Railway Company shall prosecute this appeal to effect and answer all damages and costs if it *or* shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CHICAGO AND NORTHWESTERN
RAILWAY COMPANY, [SEAL.]
By its att'y, N. M. HUBBARD, [SEAL.]
JOHN WEARE. [SEAL.]

Sealed and delivered in presence of—

Approved by

W. H. SEEVERS,
Ch. J. Supreme Court of Iowa.

STATE OF IOWA, *Linn County, ss:*

I, John Weare, being duly sworn, on oath say that I am a residence of the State of Iowa, that I am worth double the sum of twenty thousand dollars beyond the amount of my debts, and have property
226 in this State liable to execution equal to the sum of twenty thousand dollars.

JOHN WEARE.

Subscribed and sworn to before me and in my presence by John Weare this 8th Nov., 1876. Witness my hand and notarial seal the day and year last above written.

[SEAL.] ELY E. WEARE,
Notary Public.

Also appears the following writ of error. Filed Nov. 29, '76:

227 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between Seymour J. McKinley, plaintiff, and the Chicago & Northwestern Railway Company, defendant, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right and privilege specially set up and claimed under said statute, a manifest error hath happened, to the great damage of the said The Chicago and Northwestern Railway Company, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 7 day of November, A. D. 1876.

[SEAL.] ED. R. MASON,
Clerk U. S. C. C. District of Iowa.

Allowed.

W. H. SEEVERS,
Ch. J. Supreme Court of Iowa.

(Indorsed:) In sup. court State of Iowa. S. J. McKinley ag't The C. & N. W. R'y Co. Writ of error. Filed Nov. 20, 1876. E. J. Holmes, clerk S. C.

228 And on the 27 day of November, 1876, the following citation, with proof of service, was filed, to wit:

229 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Seymour J. McKinley:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Iowa, wherein the Chicago and Northwestern Railway Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said

writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable W'm H. Seevers, chief justice supreme court of Iowa, this 13 day of November, 1876.

W. H. SEEVERS,
Chief Justice Supreme Court of Iowa.

UNITED STATES OF AMERICA,
District of Iowa:

I, J. W. Chapman, U. S. marshall for said district, hereby certify and return that I served the within citation on the within-named Seymour J. McKinley, by reading the within to C. P. Shiras, and by delivering to him personally a true copy thereof, at Dubuque, Iowa, this 22d day of November, A. D. 1876, he the said C. P. Shiras being one of the firm of Shiras, Van Duzee, and Henderson, att'ys for said Seymour J. McKinley.

J. W. CHAPMAN,
U. S. Marshal.
By GEO. C. HEBERLING,
Deputy.

Mar. Fees: Miles 250, $15.00; service, 2.00; copy, 1.00—$18.00.

230 Supreme court of Iowa.

SEYMOUR J. McKINLEY
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY CO., app'l't. } From Linn dist. court.

I, E. J. Holmes, clerk of the supreme court of Iowa, hereby certify the foregoing to be true, full, and complete copies of the opinion of said court, the plaintiff's remittiter, the record entry of Oct. 23d, 1876, the record entry of Oct. 24th, 1876, the appellant's petition for writ of error to the Supreme Court of the United States, together with the supersedeas bond and the citation to plaintiff, with the return of the U. S. marshall thereon, and the original writ of error in the above-entitled cause, as true, full, and complete as the same appears of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the capitol, in the city of Des Moines, this 27th day of November, A. D. 1876.

[SEAL.]

E. J. HOLMES,
Clerk Sup. Court of Iowa.

(Indorsed:) No. 415. The Chicago and Northwestern Railway Company, plaintiff in error, vs. Seymour J. McKinley. Stipulation of counsel and addition to record. Filed 22d December, 1876.

(Indorsement on cover:) No. 145. The Chicago and Northwestern Railway Company, plaintiff in error, vs. Seymour J. McKinley. Iowa supreme court. Filed 8th September, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 145.

THE CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
SEYMOUR J. McKINLEY, Defendant in Error.

Error to the Supreme Court of Iowa.

BRIEF FOR THE PLAINTIFF IN ERROR.

B. C. COOK,
N. M. HUBBARD,
Counsel for Plff. in Error.

Republican Company, Printers, Cedar Rapids, Iowa.

SUPREME COURT OF THE UNITED STATES.

No. 145.

THE CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
SEYMOUR J. MCKINLEY, Defendant in Error.

Error to the Supreme Court of Iowa.

BRIEF FOR THE PLAINTIFF IN ERROR.

B. C. COOK,
N. M. HUBBARD,
Counsel for Plff. in Error.

THE CASE.

This cause was tried to a jury in the district court of Linn County, Iowa, November, 1873, and resulted in a verdict and judgment in favor of McKinley, for twelve thousand dollars. The Railway Company appealed to the supreme court of Iowa, and on the 8th day of December, 1875, an opinion was filed and a judgment rendered by that court, reversing the judgment of the district court. December 9th, 1875, the *procedendo* of the supreme court was issued and remitted to the clerk of the district court, by whom it was duly filed December 15th, 1875. On the same day the railway company filed in the district court its petition in due

form to remove the cause for trial into the circuit court of the U. S. for the District of Iowa, Jan. 21st, 1876, a transcript of the record and proceedings of the cause, duly certified by the clerk of the district court, was filed in the office of the clerk of the Federal Court. Afterwards, February 2d, 1876, McKinley filed a petition in the supreme court of Iowa for a re-hearing, and obtained an order of one of the Judges suspending the decision and judgment reversing the case, until the March term of the supreme court for 1876. At such March term the Railway Company filed its motion to dismiss the petition for a rehearing, on the ground that the case had been removed to the Federal Court prior to filing said petition, and that the supreme court no longer had any jurisdiction of the case. The motion was supported by the certificate of the clerk of the district court, and the clerk of the Federal Court, showing the proceedings for removal and the filing of the transcript in the Federal Court. This motion was denied at the April term, 1876, exceptions duly taken by the Railway Company, and the first writ of error allowed. At the October term of the Iowa supreme court, 1876, the petition for rehearing having been previously granted, the court rendered a final judgment in favor of McKinley, and against the Railway Company, for seven thousand dollars and costs, and from which the second writ of error was taken and allowed. By stipulation of the parties, the record of the last writ of error is made a part of the record of the first writ, and one case.

Upon these facts two questions arise: 1st. Did the right of removal to the Federal Court exist in the plaintiff in error, after the supreme court had remitted the case to the district court by its *procedendo* duly filed, and after the cause was thus regularly pending in the district court for trial?

2d. The first proposition being undeniable, could the supreme court defeat the right of removal given by the Act of Congress and already exercised by the plaintiff in error, by an attempt to recall the case from the Federal Court, on the petition of McKinley?

It is conceded by the supreme court of Iowa, and by the counsel for defendant in error, that the petition and bond for removal of the case, in all respects complied with the requirements of Act of Congress of March 3d, 1875, for the removal of causes to the Federal Courts.

ASSIGNMENT OF ERRORS.

The Railway Company alleges that there is manifest error on the face of the record, in this, to-wit :

I.

The supreme court of Iowa erred in denying and over-ruling the motion of plaintiff in error to dismiss the petition of McKinley for rehearing, which is found on page 126, record, and is in the words following:

"The appellant" (the railway company,) "moves the court to dismiss the petition filed by the appellee" (McKinley) "because, after the *procedendo* of this court was duly returned to the Linn district court, a petition was duly filed by appellant to remove the cause to the United States" (circuit) "court for trial, and the same was duly removed and filed in said United States circuit court prior to the petition for rehearing. Wherefore appellant says that the jurisdiction of the State, District and Supreme Courts, had ceased when the said petition was filed. Certificates of the facts stated are attached."

II.

In the decision of said motion the said supreme court erred in holding:

1st, That the case was pending in that court during the sixty days allowed for petition for rehearing, and after the petition and bond had been filed to remove the case to the Federal Court, and after the transcript of the record had been filed therein.

2d. That the filing the petition by McKinley rendered the proceedings to remove the cause to the Federal Court void, and defeated the jurisdiction of the Federal Court ; which decision and rulings are found on pp. 126–7, record, and in the words following :

"By the court : On appeal the judgment of the court below was reversed. Within a day or two thereafter a *procedendo* was issued by the clerk, directing the court to proceed with the case in accordance with the opinion of this court, whereupon the defendant filed a petition and bond in the court below, in strict accordance with the act of Congress passed in 1875, to remove the cause to the circuit court of the United States. Afterwards the plaintiff filed a petition for re-hearing, whereupon the defendant filed a motion to dismiss the cause.

"The Code provides as follows: 'If a petition for rehearing be filed, the same shall suspend the decision, if the court, on its pre-

sentation, or one or more of the judges, if in vacation, shall so order, in either of which case such decision shall be suspended until next term.' Sec. 3201. Such order as is contemplated in the preceding section was made. The rules of this court provide that petitions for a re-hearing must be filed within sixty days after the decision was made. At the time the procedendo was issued, and the petition and bond for the transfer to the circuit court of the United States was filed in the court below, and also at the time the transcript was filed in said circuit court, no petition for a rehearing had been filed; but such petition was filed and was pending at the time the motion to dismiss was made. And the question now is, whether the proceedings aforesaid have deprived this court of power to proceed farther in the case. As we understand the Act of Congress, no cause can be transferred to the circuit court of the United States while the cause is pending in the courts of last resort in the several states. Inasmuch as the petition for a rehearing was filed in sixty days from the decision, we hold that the cause was still pending here, and the motion must be overruled, the court holding that the proceedings taken by appellant in the district court of Linn county for the removal of the cause to the United States circuit court, did not affect the jurisdiction of this court, which still continued for the purposes of the rehearing, thereby denying that appellant had removed said cause to the United States court under the acts of Congress of the U. S., providing for the right of removal of causes from the State to the Federal Courts, as claimed on its behalf. It is therefore ordered that said motion to dismiss the petition for rehearing be overruled at cost of appellant, taxed at $——. To which ruling, judgment and decision the appellant at the time duly excepted."

III.

The said supreme court erred in granting the petition of McKinley for a rehearing after the cause had been removed to, and was pending in the Federal Court, as shown on p. 113, record.

IV.

The said supreme court erred in rendering final judgment in favor of the defendant in error and against the plaintiff in error, as shown by the record, pp. 124–5.

V.

The said supreme court erred in assuming jurisdiction to hear the petition for rehearing, and denying the rightful jurisdiction of the Federal Court.

ARGUMENT.

I.

If the two questions involved in the case, as above stated, shall be determined in favor of the plaintiff in error, the errors assigned will be sustained. The first is, did the right of removal exist in the plaintiff in error after the supreme court had remitted the case to the district court by its *procedendo* duly filed, and after the cause was thus regularly pending in the district court for trial?

The Railway Company insists that its right of removal cannot be denied. Let it be examined. The judgment of the supreme court of Dec. 8th, 1875, is in these words:

"In this cause, the court being fully advised in the premises, file their written opinion reversing the judgment of the district court, Beck, J., filing a desenting opinion."

"It is therefore considered by the court that the judgment of the court below be, and it is hereby reversed and set aside: that further proceedings be had in said court not inconsistent with the opinion in this, and that a writ of *procedendo* issue accordingly." (record p. 91.)

The *procedendo*, after reciting the appeal and the reversal, reads thus:

"Therefore you are hereby commanded that with the speed which of right and according to law you may, you proceed in the same manner as if no judgment had been rendered or appeal had been taken or prosecuted in this court, anything in the record or proceedings aforesaid heretofore certified to the contrary notwithstanding."

On the subject of remanding causes decided by the supreme court, the Code of 1873, Iowa, provides as follows:

"Sec. 3206. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court in that district."

It is thus manifest that on the 15th of December 1875, when the *procedendo* from the supreme court was filed with the clerk of the district court of Linn County, the jurisdiction of that court at once attached and the case was there pending for re-trial. It will

not be claimed that the supreme and district courts both had jurisdiction to proceed with the case *at the same time*. The filing a *procedendo* or *remittitur* from a court of last resort, in the lower court, is invariably held to vest the lower court with jurisdiction, and to divest the jurisdiction of the appellate court.

Martin vs. Nelson, 1 *Com., N. Y.* 240;
Dresser vs. Brooks, 2 *Ib*, 560;
Delaplaine vs. Bergen, 7 *Hill*, 591;
Cushman vs. Hatfield, 52 *N. Y.*, 653;
Hopkins vs. Gilman, 23 *Wis.* 512.
Esty vs. Sheckler, 36 *Wis.*, 437;
Pringle vs. Dunn, 39 *Ib*, 441;

If on December 15th when the *procedendo* was filed, the district court had been in session, or if it had convened at any time prior to the filing the petition for re-hearing by McKinley on the 2d of February afterwards, the case was subject to call by either party for trial. If pending for trial it was pending for removal. The Act of Congress provides:

"That any suit of a civil nature, at law or in equity, *now pending* or hereafter brought in any state court," &c, may be removed, Sec. 2., Act Cong. March 3d, 1875, 18 Stat. 470.

The only condition required, to be subject to the operation of the Act of Congress, is, that the case shall be pending for trial when the petition and bond are filed for the removal.

That the case was pending for trial in the district court on Dec. 15th, and would have so remained until the petition for re-hearing was filed, but for the removal, is obvious from the statute upon which defendant on error relies to re-invest the supreme court with jurisdiction. Sec. 3201, Code of Iowa, 1873, provides:

"If a petition for re-hearing be filed, the same shall suspend the decision, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which case, such decision shall be suspended until the next term."

This statute proceeds upon the theory that, after the decision is made, and the *procedendo* remitted to the court below, it shall remain in force until an order shall be made by the court or

one of the judges, suspending it. If, as the supreme court of Iowa say, the jurisdiction of the case remained in that court until the sixty days expired in which, by the rules of the court, a petition for re-hearing might be filed, there would have been no necessity for an order suspending the decision. The very fact that the statute requires an order of court, or of one of the judges, to suspend the decision, implies that prior to the order, the decision and judgment of the court were in force. If the decision was in force, its effect was to divest the jurisdiction of the supreme court, and invest the district court with the jurisdiction. Such was the only object and the only effect of the decision and the *procedendo* filed in the district court.

If the case had not been removed to the Federal Court, no one could question the right or power of the supreme court to suspend the decision, and to again take jurisdiction of the case under the statute above quoted. Nor is the right or power of that court questioned, to have withheld, by order, the *procedendo* from the district court until the time expired to file a petition for re-hearing. But the court made no such order. On the contrary, it made an order to divest itself of its jurisdiction at once. The jurisdiction of the case was again lodged in the district court, by virtue of such order, and while there pending for trial, was removed to the Federal Court in due form of law. On the 21st of January, 1876, when the transcript of the case was filed in the Federal Court, the jurisdiction of that court attached; so that, when the supreme court judge, Adams, made an order to "suspend the decision," there was no case within the jurisdiction of the district court upon which it could operate. *The decision had been executed*, as much so as though the case had been re-tried in the meantime by the district court, and a new verdict and judgment had been rendered.

It may be observed here that there is not now, nor ever has been, any statute in Iowa fixing the time within which a petition for re-hearing must be filed, nor fixing the time when the *procedendo* of the supreme court shall be remitted to the court below. At the time of the decision of this case, the supreme court had provided by a rule then in force that the petition for re-hearing must be filed in sixty days. Here is the rule:

"SEC. 91. No petition for re-hearing shall be filed after sixty days from the filing the opinion of this court." *Rules Sup. Court*, 27 *Iowa Reports*, *p.* 584.

The above rule was adopted August 4th, 1870. Subsequently to the decesion of this case by the supreme court of Iowa, and at the June term thereof, 1877, the rules were revised and the following rule added:

"SEC. 95. No *procedendo*, except in criminal cases, and in cases where petitions for re hearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon an order of one of the justices of the court, upon cause shown." 43 *Iowa R. p.* 702, (*bottom.*)

No rule existed prior to the adoption of this one, regulating the time or manner of sending the *procedendo* to the lower courts. The rule was undoubtedly made to facilitate motions for re-hearing, and to prevent the loss of jurisdiction which would inevitably occur by remitting the *procedendo* to the lower court. The same object could have been effected as well by a general direction to the clerk to retain the *procedendo* in this case, or in all cases, until the time for filing petitions for re-hearing should expire, as was done by the supreme court of Wisconsin in *Pringle vs. Dunn*, 39 *Wis.* 442.

II.

If it be true that the Railway Company had the right to remove the cause to the Federal Court after the filing of the *procedendo* in the Linn district court, the second question is, could the supreme court defeat the right of removal given by the Act of Congress and already exercised by plaintiff in error, by an attempt to recall the case from the Federal Court on the petition of McKinley?

The statement of the question answers it. At most there was a statutory right to retake jurisdiction of the case within sixty days from the filing the opinion of the court. The court had exhausted its power over the case by rendering final judgment of reversal and remitting its *procedendo* to the court below. Before jurisdiction could again be acquired or assumed, two things were necessary: 1st. McKinley must file a petition for re-hearing. 2d. The court, or one of its judges, must make an order to suspend their former

decision. During sixty days McKinley had the option to invoke the power to recall the case. He might or might not exercise this option. If he did not, it is too clear for argument that the supreme court could never again acquire jurisdiction of the case. And this shows that the case was not actually *within* the jurisdiction of the supreme court as claimed by it, during the sixty days. Now, if the case could be recalled only by the action of McKinley, was this action subject to the condition that the case had not in the meantime been lawfully disposed of by the district court? Or was the right absolute and unconditional during the sixty days? If it can be said the right was absolute and unconditional, then McKinley might have re-tried the case in the Linn district court, and if beaten, filed his petition for re-hearing in the supreme court, obtained it, and procured an affirmance of his old judgment. Or, he might have followed the case to the Federal Court, tried it there with a like result, and then returned to the supreme court with his sixty day optional jurisdiction, and obtained his re-hearing in the state supreme court, and an affirmance of the old judgment. If it be said that sixty days is not sufficiently long to insure the success of such a proceeding, it is within the easy range of probability. The power which gives sixty days, may give a year in which to file a petition for re-hearing, and in that way the case could be recaptured while pending in this court on error to the United States Circuit Court. Indeed, under such a construction, this jurisdictional option may be so conveniently lodged that the supreme court of Iowa may feel quite easy about its jurisdiction when once acquired. By such a construction, the question whether the defendant shall remove his case to a Federal Court, is made to rest wholly in the option of his adversary.

It may be said that if McKinley had gone to trial in either the state, district, or the United States circuit court, he would have been estopped from asserting his right to petition for re-hearing in the supreme court. Not at all, if the supreme court had jurisdiction. But for the removal of the cause, nothing can be clearer than that the district court of Linn county could have proceeded to try the case any time between December 15th, 1875, and February 24, 1876, when Judge Adams made the order to suspend the decision. Now, if it be equally true that during this same time the

supreme court also had jurisdiction of the case, as it claims, and McKinley's right to petition for re-hearing was absolute and unconditional during the sixty days, it is evident that he had a right to proceed in both courts at the same time; in one to try on the merits, and in the other to re-hear on appeal. No such absurdity in the law is possible. After the *procedendo* was filed in the lower court, the supreme court had the power, by statute and its own rules, to re-call the jurisdiction on the petition of McKinley any time within sixty days, provided in the meantime the case had not been lawfully removed, or otherwise disposed of by the district court. This condition was created by sending the *procedendo* to the district court.

Suppose section 3201, Code of Iowa, above quoted, had been framed thus:

"SEC. 3201. If a petition for re-hearing be filed, the same shall suspend the decision, if the court, on its presentation, or one of the judges if in vacation, shall so order, at any time before the final trial of the case in the inferior court."

Such a statute would place the power in the hands of the beaten party to a suit to defeat a removal of the cause to the Federal Court. Because, it could be said that up to the final trial the right is absolute to re-hear in the supreme court, and after final trial begun, the Act of Congress is unavailing to authorize a removal. Such a legislative or judicial contrivance, so construed, is in conflict with the Act of Congress for the removal of causes, and is not only void, but a delusion and a snare. But such a statute as above supposed would not be obnoxious to the removal acts, if construed to mean that the supreme court might recall the case, *provided it had not been lawfully removed to the Federal Court or otherwise lawfully disposed of by the district court.* The essence of the error is, that the supreme court denies the right of the district court to proceed with the case between the filing the *procedendo* there on December 15th, and the 2d of February afterwards, when Judge Adams issued his order to suspend the decision. Of course if the district court had no right to proceed with the case, it was because the supreme court did not invest it with the jurisdiction. So it turns out that what the supreme court means to say is, that its own order to the district court to proceed as though no

judgment had ever been entered, although filed with the district court, gave that court no power to proceed with the cause. A great deal of fine word trimming was apparently done to avoid stating this conclusion too abruptly, and it is thus mildly put: "The court holding that the proceedings taken by appellant in the district court of Linn county for the removal of the cause to the United States circuit court, did not affect the jurisdiction of this court, which still continued for the purposes of the re-hearing, thereby denying that appellant had removed said cause to the United States circuit court, under the Acts of Congress of the United States, providing for the right of removal of causes from the State to the Federal Court, as claimed on its behalf." Record, p. 127.

All this must mean a denial of the jurisdiction of the district court, because, if it be conceded that the district court had jurisdiction to re-try the case on December 15th, 1875, after the *procedendo* was filed, the right of removal cannot be denied. For if the district court had jurisdiction, the case was "pending" within the meaning of the Act of Congress of March 3d, 1875, and a removal of the cause was effected.

Finally, the case must turn on the effect of the *procedendo* of the supreme court. If that document means what it says, the district court was clothed by it with authority to proceed as if no judgment had ever been rendered. This means jurisdiction to try the case. If the case was pending for trial, so it was for removal. This is as apparent as the geometrical axiom that all right angles are equal to each other.

III.

It will be claimed, perhaps, that whether the case was pending for trial in the Linn district court, and thus subject to removal, depends upon state statutes and the rules of the state supreme court, and that the construction of such statutes and rules by that court is conclusive and binding upon this court.

There are several answers to this:

1. Whether a case is pending for trial, in a court of original and exclusive trial jurisdiction, is mainly a question of fact, to be determined by an inspection of the record. A clearly mistaken finding of such fact by one court, ought not to bind any other court

which has jurisdiction to inspect the record for itself. When the supreme court of Iowa held that plaintiff in error had not removed the cause to the Federal Court, they held that their own mandate to the Linn district court to try the cause, did not invest that court with any jurisdiction to do so, or any authority to proceed in accordance with such mandate.

2. This court has already held, in denying the motion to affirm and dismiss by defendant in error, last December, that a Federal question was involved in the decision of the supreme court in this case. That question was, whether the right of removal existed in the plaintiff in error,at the time the petition and bond were filed, in the Linn district court, for that purpose. If, to determine this question, it became necessary also to construe a state statute, or the rules of the supreme court of Iowa, such question was merely incidental to the main one, namely: whether the Federal jurisdiction had attached, and must be decided by the Federal Court without regard to the decisions of the state court. If it were otherwise, the state courts could decide all questions relating to the jurisdiction of the Federal Courts, in cases where a removal may be applied for, and thus bind the Federal Courts. The main question here was, whether the case was removable on December 15th, 1875, under the Act of Congress of March 3d, 1875. This involved three principal inquiries: 1st. Whether the petition and bond were, in all respects, such as the act requires to authorize a removal. 2d. Whether the case was properly pending in the state court for trial on its merits, within the meaning of the Act of Congress. And 3d. Whether the application was in apt time. All these are to be determined by the Federal Court. None of them can be conclusively determined by the state courts. The most that can be said in this case is, that both a State and a Federal statute were involved. It is idle to say that because, ordinarily, the State court has conclusive power to construe a State statute, that it can conclude the Federal Court as to either, when both Federal and State statutes are involved.

3. This case comes here under the 25th section of the Judiciary Act. In *Butz vs. City of Muscatine*, 8 *Wall.* 582, this court say: "In all the cases brought here under the 25th section of the Judiciary Act, this court has never hesitated to determine for itself the construction and effect of any statute of a state, brought under

review, without reference to the previous adjudications of the highest court of the state upon the subject."

In the case of *Insurance Co., vs. Dunn*, 19 *Wall.* 222, this court overruled the construction of a statute of Ohio given it by the Ohio supreme court, in regard to the precise point involved in this case, namely: Whether the case was pending for final trial in the inferior state court when the petition and bond for removal to the Federal Court were filed.

IV.

This suit was removed under the act of March 3d, 1875, the third section of which is as follows:

"SEC. 3. That whenever either party, or one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from the State court to the circuit court of the United States, he or they may make and file a petition in such suit, in such State court, before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending."

It is claimed by the defendant in error, that the words "before or at the term at which said cause could be first tried and before the trial thereof" should be construed to mean, "before the first trial of the case." It is submitted that the words "could be first tried" refer only to the *term of court*, and not to a first or second trial of the case. This is obvious, because the second section provides that the act shall apply to all suits "now pending or hereafter brought."

The above section has been construed by this court in *Lowe vs. Williams*, 4 *Otto*, 651. The court say:

"The act of March 3d, 1867, 14 Stat. 558, provided for the removal of causes from the State courts to the circuit courts, under certain circumstances, when due application was made 'before the final hearing or trial of the suit.' This was held in *Stevenson vs. Williams*, 19 *Wall.* 575, to mean 'before final judgment in the court of original jurisdiction where the suit is brought.' To the same effect are *Vannever vs. Bryant*, 21 *id.* 43, and *Fashnacht vs. Frank*, 23 *id.* 419, decided since. The act of March 3d, 1875, 18 Stat. 471, under which the removal was attempted in this case, requires the petition to be filed 'before the final trial.' The decisions under the act of 1867 are, therefore, equally applicable to that of 1875."

Tested by this decision the plaintiff in error was entitled to a removal of the cause.

V.

The application in this case was made in apt time. The act of 1875 should be construed to refer to a term occurring after its passage.

M. & M. Bank vs. Wheeler, U. S. District Court, Southern District of N. Y. 3 *Central Law Journal*, 13, *Andrews vs. Garrett*, 2 *Cen. L. J.* 797, *Southern District of Ohio.*

VI.

As to the effect of filing the petition and bond for removal on the jurisdiction of the State court, Judge Dillon in his work on "Removal of Causes," section 15, page 33, says:

"If the case be within the Act of Congress (1875) and the petition is in due form, accompanied with the offer of the required surety or bond, the statute is that the State court *must* accept the surety or the petition and bond, and proceed no further in the case. Under such circumstances the State court has no discretion to refuse the removal, and can do nothing to affect the right, and its rightful jurisdiction ceases *eo instanti*; no order for the removal is necessary, and every subsequent exercise of jurisdiction by the State court, including its judgment, if one is rendered, is erroneous." Citing,

Hereford vs. Etna Ins. Co., 42 *Mo.* 154.
Ackerly vs. Villas, 1 *Abb. U. S.* 284.
Fisk vs. Union Pacific R. R. Co., 6 *Blatch.* 362.
Stevens vs. Phœnix Ins. Co., 41 *N. Y.* 149, and other cases.

In the case of *Osgood vs. R. R. Co.*, 6 Bissell, 330, the petition and bond for removal were filed in the vacation of the State court, with the clerk, and it was held that this, without any action of the court, as to the sufficiency of the petition or bond, *ipso facto* deprived the State court of jurisdiction. In the language of this court in *Insurance Co. vs. Dunn*, *supra*, the "power of paramount and final judgment rests with the Federal tribunal," whether the case has been properly removed.

B. C. Cook and
N. M. Hubbard,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.—No. 145.

THE CHICAGO & NORTH-WESTERN RAILWAY CO.,
Plaintiff in Error,
vs.
SEYMOUR J. McKINLEY,

ERROR TO THE SUPREME COURT OF IOWA.

REPLY OF PLAINTIFF IN ERROR TO ~~#~~ McKINLEY.

argument of

I.

The III paragraph of the argument for defendant in error insists that the question whether the State Supreme Court had jurisdiction at the time the removal was effected, depends solely upon the construction of the Statutes of Iowa and the rules of the Supreme Court, and that the decision of the State Supreme Court on such questions is conclusive and binding upon this court. In the nature of things this cannot be so, when the State Supreme Court decision affects the jurisdiction of this court. But if the rule be conceded to be applicable here, the further qualification is necessary to be stated, namely: that this court follows the latest interpretation of a local statute, given to it by the highest court of the State. The decision in the case at bar was made by the Supreme Court of Iowa, on Tues-

day, October 17, 1876, (44 Iowa, 310). On the 20th of October, 1876, that court decided the case of *Fenton vs. Way*, 44 *Iowa*, 439. The case had been reversed by the Supreme Court and the opinion and procedendo filed in the district court. There the plaintiff moved for a decree in accordance with the opinion and procedendo. The defendant objected, because the time had not expired in which to file a petition for re-hearing, and gave notice of his intention to do so. The district court entered the decree as directed by the Supreme Court, and the defendant appealed. The court say: "The court did not err in proceeding to enter a decree pursuant to the direction of this court, in accordance with the opinion. The objections interposed by the defendants are without merit. The court could not be expected to withhold action upon the suggestion that defendant intended to petition for a re-hearing. Upon the filing of such petition *and order from a judge of this court, the procedendo would be re-called. That not having been done, when the plaintiff moved for a decree, it was the duty of the court below to proceed pursuant to the order contained in the procedendo.*" This was a chancery case and the opinion was necessary to know what decree to enter, but the *procedendo* was the warrant for the lower court to proceed, and the opinion so states. Nothing can be plainer than this case makes it, that the *procedendo* in the case at bar filed in the district court on the 15th of December, 1875, gave that court power to proceed to try. The right to a trial being complete, the right to a removal must exist if properly applied for. In view of this *latest* decision of the Supreme Court of Iowa, the calamitous absurdity of the decision in this case as stated by counsel for defendant in error, is nakedly apparent. Here it is: "Thus we have an authoritive construction of the provisions of the Code of Iowa given by the Supreme Court of that State, which must be accepted by this court, as the

true interpretation of the statute, and by this decision it is settled that during the sixty days allowed for the filing of a petition for re-hearing, a cause remains in the Supreme Court, subject to its jurisdiction, even though a *procedendo* may have been issued and filed in the lower court." * * * * "The State court having thus construed the State statute, and having settled the question that its jurisdiction had not been affected by *the issuing of the procedendo*, it followed as a necessary consequence that the petition for removal filed in the District Court of Linn County, could not remove the cause that was still pending in the Supreme Court, to the U. S. Court."

(P. 17, brief for McKinley.)

II.

The IV paragraph of the argument for KcKinley, claims that plaintiff in error did not comply with the requirements of Section 3206 of the Code of Iowa, so as to give the district court jurisdiction, because the "decision and order of the court thereon," were not "certified," and "entered on the records of the court." And this claim rests upon the statement that the filing of the *procedendo* is not enough to do to comply with the section mentioned.

Two further sections of the Code of Iowa will dispose of this objection.

Section 196, p. 33, Code 1873 reads thus: "The records of each court consist of the original papers constituting the causes adjudicated or pending in that court, and the books prescribed in the next section." There are eight books provided for in the "next section," but none of them require, or are for the purpose of recording *procedendos* in.

Section 3184, (p. 515.) "In an action by ordinary proceedidgs, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries

made by the clerk, *and all papers pertaining to the cause and filed therein*, except subpœnas, depositions, and other papers which are used as mere evidence, *are to be deemed part of the record*." * * *

It is clear from these sections that the *procedendo*, on being filed by the clerk, became a part of the record of the district court.

It will be observed that section 3206, above referred to, does not require a copy of the opinion to be filed, or a *copy* of the decision to be filed in the district court. It only requires that the "decision and the order of the court thereon," shall be "*certified*," to the district court. The *procedendo* itself contains the *decision*, in these words:

"The State of Iowa, ss:"

"The State of Iowa to the District Court of Linn County:

"WHEREAS, the Supreme Court of said State being lately certified of the record and proceedings in a certain cause which was in the district court for the county of Linn, and State aforesaid, wherein Seymour J. McKinley was plaintiff and the C. & N. W. R. R. Co., was defendant, in which said cause judgment was rendered against the defendant, from which judgment so rendered the defendant appealed to the Supreme Court, and the said court having duly examined the record and proceedings aforesaid in the premises, at Des Moines, in said State, on the 8th day of December, 1875, did reverse the judgment aforesaid as rendered in the court below, and order further proceedings to be had in said court not inconsistent with the opinion of the Supreme Court; therefore you are hereby commanded, etc.," * * *

We think this a good certificate of the decision.

The argument of the learned counsel on this point exhibits singular extremity, and is only fitly characterized by the maxim, *tabula in naufragio*.

Respectfully,

B. C. COOK AND
N. M. HUBBARD,
Att'ys for Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1878.

Chicago & Northwestern Railway Company,
Plaintiff in Error.

vs.

Seymour J. McKinlay, Defendant in Error.

Writ of Error to the Supreme Court of Iowa.

Brief on Behalf of Defendant in Error.

D. B. HENDERSON,
O. P. SHIRAS,
Counsel for Defendant in Error.

TIMES PRINT, DUBUQUE, IOWA.

IN THE

Supreme Court of the United States,

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CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error, *vs.* SEYMOUR J. McKINLAY, Defendant in Error.	No. 145.

WRIT OF ERROR TO THE SUPREME COURT OF IOWA.

Brief on Behalf of Defendant in Error.

D. B. HENDERSON,
O. P. SHIRAS,
Counsel for Defendant in Error.

POINTS.

I.

The record shows that this case was rightfully brought in the State Court, and was within the jurisdiction thereof; that the plaintiff in error went to trial in the District Court, and being defeated therein, carried the case to the Supreme Court of Iowa, for the purpose of obtaining a new trial, which was finally refused by that Court.

II.

Under the acts of 1866 and 1867, the rule is well established that an application for removal of causes to the

Federal Tribunal, must be made before final trial on the merits in the Court of original jurisdiction, and that after trial therein, and an appeal to a higher Court, it is too late to ask a removal.

Sewing Machine Cases, 18 *Wall*, 584.
Stevenson vs. Williams, 19 *Wall*, 575.
Fashnacht vs. Frank, 23 *Wall*, 419.

III.

The act of 1875 provides that the removal must be applied for "before or at the term at which the cause could be first tried, and before the trial thereof."

IV.

In the case at bar, the suit had been finally tried in the District Court, and was pending in the Supreme Court when the application for removal was made.

Even if the Supreme Court had finally granted a new trial, and had remanded the cause for that purpose, a removal could not then be had.

Lowe vs. Williams, 4 *Otto*, 650.

In re Frazer, U. S. Circuit Court for Michigan, Albany Law Journal, Vol. 18, 353.

Young vs. Andes Ins. Co., 3 *Central Law Journal*, 719.

V.

Even if such removal could be had upon the granting of a new trial, it must be shown that the right thereto has been perfected, before the application for removal can be granted.

Vannevar vs. Bryant, 21 *Wall*, 43.

VI.

The question of the granting of a new trial is one solely for the State Court. The record in this case shows that the State Supreme Court finally overruled the exceptions taken by plaintiff in error, and refused a new trial.

VII.

The claim made by plaintiff in error, that the filing of

the *procedendo* in the District Court deprived the Supreme Court of further jurisdiction of the cause, depends upon the construction of the provisions of the code of Iowa, and the interpretation put thereon by the Supreme Court of Iowa, is binding upon this Court.

Walker vs. State Harbor Commissioners, 17 *Wall*, 651.
Leffingwell vs. Warren, 2 *Black*, 603.

VIII.

Under the Code of Iowa, as construed by the Supreme Court, the highest appellate tribunal of the State, during the time allowed for filing a petition for re-hearing under the statute, the case for that purpose continues within the jurisdiction of the Supreme Court. It follows that this jurisdiction can not be taken away or defeated by the filing of a petition for removal of the cause in the lower Court.

IX.

The code of Iowa provides that when a cause is remanded by the Supreme Court to a lower Court during vacation, the order and decision must be entered on the records of the Court. Sec. 3206 of Code of 1875. This was not done in this case, and hence the District Court, when the petition for removal was filed therein, had not acquired jurisdiction of the cause for any purpose.

X.

The plaintiff in error never presented its petition and bond to the District Court of Linn County for acceptance as required by the act of 1875. The removal therefore was not perfected, even if the right thereto existed.

XI.

It is evident that the action of plaintiff in error, in suing out a writ of error to this Court, and preventing the collection of the judgment in favor of defendant in error, by giving a supersedeas bond, was taken with the intent to delay and harass the defendant, and that the case is a

proper one for the enforcement of the rule granting extra damages against parties suing out writs of error for delay only.

ARGUMENT.

I.

When this action was originally brought in the District Court of Linn county, Iowa, the Railway Company had the right to remove the cause into the U. S. Circuit Court for trial. The Company elected to try the case in the State Court. The cause was heard before the Court and Jury upon its merits, and a verdict was rendered against the Company. A motion for a new trial was made and overruled, and judgment was entered upon the verdict. This was a finality to the case in the Court of original jurisdiction. Up to this point no application for a removal of the cause to the Federal Court had been made. The Railroad Company then carried the case to the Supreme Court of Iowa on errors of law assigned. The first opinion given in the Supreme Court was in favor of a reversal and for a new trial, but upon the rehearing the Court finally overruled the errors assigned and refused a new trial.

The plaintiff in error claims that upon the filing of the first pinion it succeeded in oprocuring a removal of the cause to the Federal Court, by reason of a petition for removal filed in the District Court of Linn county.

The first question to be determined is, whether the Railway Company would be entitled to a removal of the cause under the act of 1875, if the Supreme Court of Iowa had finally granted a new trial and remanded the cause for that purpose to the District Court.

Under the judiciary act, the application for removal was required to be made at the time of entering appearance in the trial Court. Under the act of 1867 the time for filing the application for removal was extended to "any time before the final hearing or trial of the suit."

The act of 1875 provides that the petition for removal must be filed "before or at the term at which said cause could be first tried and before the trial thereof."

In construing the acts of 1866 and 1867, this Court held that the words "before the final hearing or trial of the suit," meant, "before final judgment in the Court of original jurisdiction where the suit is brought."

Stevenson vs. Williams, 19 *Wall*, 575.

Fashnacht vs. Frank, 23 *Wall*, 419.

Under the judiciary act the limit of time which terminated the right of removal, was the entering of an appearance in the trial Court. Under the acts of 1866 and 1867, the limit of time was extended to the final hearing or trial in the Court wherein the suit was originally brought.

Sewing Machine Cases, 18 *Wall*, 584.

Under the latter acts, as well as under the judiciary act, if the limit of time thus fixed was passed without applying for the removal, the right was lost, and no matter how many new trials were subsequently had in the State Courts, the place of trial could not be changed from the State to the Federal Tribunal.

In Insurance Company vs. Dunn, 19 *Wall*, 214, suit was instituted in the Court of Common Pleas of Hamilton county, Ohio; a trial was had and judgment rendered. Under the statute of Ohio, a party by giving bond as required by the provisions of the act, is entitled to one new trial as a matter of right. The bond was given, and the party became entitled to a new trial in the Court of original jurisdiction. Thereupon the Insurance Company filed a petition for removal to the Federal Court under the act of 1867. The question to be determined was whether the first verdict and judgment was *final* within the meaning of the act. This Court held that as the statute entitled a party to a new trial upon giving bond, and as the provisions of the statute had been fulfilled, there had not

been a final trial in the Court of original jurisdiction, and hence that the application was in time.

In *Vannevar vs. Bryant*, 21 *Wall*, 43, the record showed that a verdict had been rendered, a motion for new trial had been made, but before it was acted upon, a petition for removal under the act of 1867 was filed. This Court held that the removal was properly refused. The opinion indicates that if the motion for a new trial had been granted, and the case had been pending for trial the removal would have been allowed. This would have been under the principle that as no final judgment had been entered in the lower Court, the application would have been made before the final trial in that tribunal.

These cases therefore do not annul or vary the rule established in *Stevenson vs. Williams and Fashnacht vs. Frank*, that the right of removal does not exist unless applied for before the final trial in the Court of original jurisdiction.

In the case at bar, the record shows that a trial on the merits was had in the Court of original jurisdiction before the Court and Jury, a verdict was rendered, a motion for new trial made and overruled, judgment entered on the verdict, and the cause was then taken by the Railway Company to the Supreme Court;—all these steps being taken nearly two years before any application for a removal of the case was filed.

We submit therefore that even under the language of the acts of 1866 and 1867, the application for a removal came too late, because a final trial in the Court of original jurisdiction had been had, within the meaning of those acts as construed by this Court.

The language of the act of 1875 however is still clearer in support of our proposition, than that of the acts of 1866 and 1867. Under the act of 1875, the petition for removal must be filed "before or at the term at which said cause could be first tried, and before the trial thereof."

The word *final* is omitted, and the time within which the application is to be filed is the term at which a trial could be had, and before a trial. Under this statute if a party goes to trial in the State Court, is beaten therein and obtains a new trial, he can not then obtain a removal of the the cause. The statute does not intend to allow a litigant to take his chances in the State Court during one trial, and then upon getting a new trial on some point, remove the cause into the Federal Tribunal.

This we understand to be the doctrine held in the cases of:

Lowe vs. Williams, 4 *Otto*, 650.

In re Frazer, U. S. Circuit Court for Michigan, Albany Law Journal, Vol. 18, 353.

Young vs. Andes Insurance Company, 3 *Central Law Journal*, 719.

It is claimed however by counsel for plaintiff in error, that as this action was brought before the enactment of the statute of 1875, the use of the words "now pending" in section 2 of the act, enlarges the time and enables the Railway Company to make the application even after a trial, verdict and judgment in the State Court. We do not believe this is the true construction of the act.

The words "now pending or hereafter brought," were used together to show that the act was intended to apply to cases pending, as well as to those hereafter brought, but it was not intended to grant to suitors in cases "pending," any greater rights than are conferred upon parties to suits "hereafter" brought.

If the act had read, that in "all cases hereafter brought," &c., the act would only have been held applicable to actions instituted after its passage. Of course, when the act took effect, there were then pending in the Courts, a large number of actions, which had not, however, progressed to the trial term. These actions would be within the terms of the statute, and as to them, the right of re-

moval existed, up to the trial term. As to actions pending, which had passed the trial term, these could not be removed under the act of 1875. The parties to these actions had enjoyed the right of removal under the acts of 1866 and 1867, or preceding acts, and as to them no right of removal existed under the act of 1875, because parties therein could not bring themselves within its terms, by making application at or before the trial term. No hardship is worked to such parties by this construction, because they had already enjoyed the privilege conferred by the act of 1875, *i. e.*, the right of removal to the United States Court if applied for before passing the trial term.

As we construe sections 2 and 3 of the act of 1875, the true meaning thereof is:

"That in any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court, wherein, &c., * * either party may remove suit into the Circuit Court of the United States for the proper district, provided he or they make and file a petition in such suit, in the State Court, before or at the term at which said cause could be first tried and before the trial thereof, for the removal of said cause."

Under the act of 1875, the right of removal does not depend upon the question whether the cause was "now pending," or w. "hereafter brought," but upon the fact, that the petition for removal is filed "before or at the term at which a trial could be had, and before trial." It must appear that this has been done, or else the right of removal does not exist.

But it is said, that as to cases which had been pending more than one term, or in which a trial had been had, this construction would prevent a change being taken in these cases under the act of 1875.

This, we think, is exactly what the statute of 1875 was intended to enact.

It was intended to *restrict* the right conferred by previous statutes, so far as the time was concerned, and by its provisions no change could be taken in cases which had been pending longer than the trial term.

These cases might still be removable under the previous statutes, but if the right was sought under the act of 1875 as was done in this case, then it was incumbent on the party to bring himself clearly within the terms of the statute.

If the contrary construction is maintained, the result is, that the statute is made to read: "That in all suits now pending," the right of removal may be exercised at the next term of court, no matter whether that is the trial term or not, but that in cases "hereafter brought," the right must be exercised at or before the trial term, and before trial." We submit that this construction does violence, not only to the language of the statute, but to its true intent and meaning.

As we understand the act, its meaning is, that in all suits now pending or hereafter brought, in which application for removal is made at or before the trial term, and before the trial, a removal may be had. Cases which have passed the trial term and have been once tried, are not within this statute, and are not affected by it.

The statutes are not to be extended by construction beyond the fair import of the language used. When the act of 1875 was adopted, Congress knew that this Court had construed the words "final hearing or trial," found in the previous acts, to mean final trial in the Court of original jurisdiction.

With this knowledge Congress still further limited the time within which the application or removal could be made, by omitting the word final, and enacting that the application must be made before or at the first term at which the cause could be tried, and before trial, thus carefully negativing the idea that a party might go to trial,

and if beaten obtain a new trial, and then obtain a removal. That this is the true intent of the statute can not, it seems to us, be successfully questioned.

But counsel for plaintiff in error, take the ground that whilst this may be the proper construction of the act, as to causes brought after the passage of the act, yet if it be applied to the present case, it would prevent a removal of the cause, and therefore some other construction must be given to the act, or in other words, two different constructions must be given to the same words in the same act. We submit that no such rule of construction is admissible. The act of 1875 confers the same right upon parties in actions pending and in actions thereafter brought namely, the right of removal, provided application is made therefor, at or before the term at which the cause could be first tried, and before trial. No case which has passed the trial term and been once tried, can be removed under this act. The right conferred is statutory, and a party invoking the aid of the statute "must show upon the record that his is a case which comes within the provisions of the statute."

Insurance Company vs. Pechner, 5 *Otto*, 185.

II.

Counsel for plaintiff in error claim however, that the Railway Company is entitled to a removal of the cause, on the theory that it had perfected a right to a new trial, and that under the rule laid down in *Insurance vs. Dunn* and *Vannevar vs. Bryant*, *Supra*, it was entitled to remove the cause to the Federal Court.

These cases arose under the acts of 1866 and 1867, and as we have already shown, they do not establish the doctrine, that after a final trial in the Court of original jurisdiction and a removal of the case to the appellate tribunal, a removal can be had, even if the appellate tribunal grants a new trial, and this is especially true under the language of the act of 1875.

It however, for the sake of the argument, we were to admit that the construction claimed by plaintiff in error was correct, it would still be necessary for the Railway Company to show that it had perfected a right to a new trial. Does the record show this to be the fact?

It is not questioned that the District Court of Linn county, Iowa, had jurisdiction full and complete of the cause when the same was heard before it. The judgment of that Court is then binding on the parties litigant, unless reversed by some competent tribunal. The only Court competent to reverse the judgment rendered, is the Supreme Court of Iowa. Plaintiff in error carries the case to that tribunal. For what purpose? For the purpose of reversing the judgment rendered, and obtaining a new trial on the issues of law and fact involved in the cause. Of these questions, the State Tribunal is the sole arbiter. The Federal Courts can not determine whether there was or was not error committed on the original trial, nor whether the judgment rendered shall be set aside or not.

Unless therefore it is shown that in the State Court, plaintiff in error is entitled to a new trial, no removal can be had to the Federal Tribunal. All that the Railway Company can possibly claim is that if a new trial is to be had between the parties on the facts originally in issue, the company has the right to remove the case for the purpose of such new trial into the Federal Court. The real question therefore to be determined, is whether the company has become entitled to a new trial on the original issues, by the vacation of the verdict and judgment rendered in said cause.

It must appear that it is entitled to a new trial in the State Court, and that unless a removal is had, it will be forced to go to trial in the State Tribunal. Unless this is shown, a removal can not be had, even under the theory advanced by counsel for plaintiff in error. Now the rec-

ord shows beyond all controversy, that the Railway Company can not have a new trial in the State Court.

The Supreme Court finally overruled the errors assigned, and denied a new trial. The position therefore occupied by plaintiff in error, amounts to this: that although in the State Courts, it can not have a new trial, nevertheless it is entitled to a removal of the cause for a new trial into the U. S. Circuit Court, and that such removal shall have the effect of vacating and setting aside the verdict and judgment rendered by the State Court.

Having gone to trial in the State Court, the company now seeks to avoid the adverse judgment rendered, by claiming that before the cause was finally determined by the Supreme Court of Iowa, it succeeded in removing the cause into the U. S. Circuit Court, and thereby deprived the Supreme Court of Iowa of any further jurisdiction of the cause. Such a position overthrows the principles announced by this Court in *Vannevar vs. Bryant*, and other cases already cited, and if approved by this Court, would lay the Court open to the charge of violating all established rule and precedent, in order to snatch from the State Court the jurisdiction of a cause which had been regularly submitted to that tribunal by the very party that is now seeking to evade obedience to its judgment.

Briefly stated, the proposition to be determined, is as follows :

Can a party who has gone to trial in a State Court, of competent jurisdiction, and against whom a verdict and judgment have been rendered, obtain a removal of the cause for a re-trial to the United States Circuit Court, under the act of 1875, when in the State Court, the party would not be entitled to a re-trial, but would be bound by the verdict and judgment already rendered?

Even counsel for plaintiff in error will be compelled to admit that under the construction they attempt to give

to the cases of *Vannevar vs. Bryant*, and *Insurance Co. vs. Dunn*, they are compelled to show that the Railway Company had a perfected right to a new trial, and that it is for the State Supreme Court to decide the question whether such new trial shall be had. Over that question, the U. S. Circuit Court has no jurisdiction whatever. It can not interfere with the right of the Supreme Court of Iowa to hear and finally determine the case brought before it from the District Court, according to the methods and regular modes of procedure obtaining in that tribunal. To hold the contrary, would be in effect holding that the U. S. Circuit Court can exercise appellate and revisory powers over cases regularly tried by State Courts of competent jurisdiction.

Now in the case at bar, the record shows that the Supreme Court of Iowa has refused to grant a new trial, and that the Railway Company is not entitled to a new trial, but is bound by the proceedings already had. There is no pretense that in so deciding, the Supreme Court of Iowa has in any way or manner, violated any statute or law of Iowa. Hence it is clearly shown, that in the State Court the Railway Company is not entitled to a further trial, but that there is a final judgment rendered against it, which in the State Court is valid and binding.

The Railway Company itself carried the cause to the Supreme Court of Iowa, for the purpose of obtaining a reversal of the cause, and a new trial on the facts. It failed to accomplish its object. It did not become entitled to a new trial. True, the first opinion of the court was in favor of a reversal, but upon mature deliberation upon the petition for rehearing, the Court finally overruled the exceptions and refused a new trial. In entertaining the petition for rehearing, the Court simply obeyed the provisions of the statute of Iowa, and followed the well established practice of the Court.

Suppose the U. S. Circuit Court should, for any valid reason, hold that the cause could not be removed under the act of 1875, can it be claimed that the Railway Company could insist upon a new trial in the District Court of Linn county? Clearly not. In the State Courts the case is at an end, and the rights of the parties are fixed by the decision and judgment of the Supreme Court.

It must be admitted therefore, that the Railway Company has not succeeded in perfecting a right to a new trial in the State Court, and under the authorities we have already quoted, this right must be perfected before a removal can be had.

The privilege of removing a cause from a State to the Federal Tribunal, is given only to a litigant who will otherwise be compelled to try the issues in a State Court. The removal does not affect the proceedings already had, nor the rights conferred thereby, but is only of force, in case the parties ultimately are compelled to resort to a new trial in order to settle the issues between them. If the trial already had in the State Court is decisive of the issues, there is nothing left to try, and hence there are no issues to be removed into the Federal Court.

III.

Counsel for plaintiff in error base their claim to a reversal on the ground, that a *procedendo* issued from the Supreme Court of Iowa remanding the cause to the District Court of Linn County, and that before the petition for rehearing was filed in the Supreme Court, they had filed in the District Court of Linn county, a petition for removal under the act of 1875.

It is claimed that the filing of the petition for removal in vacation, without any order being made thereon by any Court, State or Federal, had the effect of depriving the State Supreme Court of all further jurisdiction of the cause. The theory of counsel is, that the issuing of the

procedendo withdrew the case and all further jurisdiction thereof from the Supreme Court, and vested it in the District Court. They are compelled to admit, that if the jurisdiction of the Supreme Court continued for any purpose connected with the appeal, after the issuing of the *procedendo*, then the filing of the petition for removal in the District Court, would not effect the jurisdiction of the Supreme Court.

Now the question of the effect of the issuing of the *procedendo*, upon the further jurisdiction of the Supreme Court of Iowa, depends solely upon the construction to be given to the provisions of the statute of Iowa. It is not affected in the least by the filing of the petition for removal to the U. S. Court. Counsel for plaintiff in error have cited in their brief, several provisions of the Code of Iowa which bear upon the question, and upon the construction of which, depends the question whether upon the issuing of a *procedendo*, the Supreme Court has parted with all further jurisdiction of the case.

Suppose the Code of Iowa provided that upon the filing of an opinion by the Supreme Court reversing a cause, the clerk within twenty-four hours thereafter, should issue a *procedendo* to the lower Court. That a petition for rehearing might be filed in the Supreme Court within sixty days, the filing of which should suspend the decision already rendered. That the Supreme Court should consider the petition for rehearing, and if the same was well taken, should render a final decision in the cause.

Now in the first instance, under such a statute, would not the question as to the continuing jurisdiction of the Supreme Court, after the issuing of the *procedendo* by the clerk, during the sixty days allowed for asking a rehearing, be a question to be determined alone by the construction to be put upon the terms of the statute, and as such, would not the construction given thereto by the Supreme Court of Iowa, be received and treated by this Court, as au-

thoritative and binding? If it should appear that the Supreme Court of Iowa had held that under such a statute, the issuing of the *procedendo*, did not withdraw the case from the jurisdiction of that Court, but that the same continued during the sixty days allowed for filing petition for rehearing, would this Court ignore such decision and hold that it went for naught? If so upon what theory?

To ignore it, would be to abandon the well established rule that this Court will follow and give force to the construction given by the State Courts to the statutes of the State.

It is clear therefore that the interpretation of such a statute by the Supreme Court of Iowa, in the language of this Court in *Walker vs. State Harbor Commissioners*, 17 *Wall*, 651, must be "accepted as the true interpretation, whatever our opinion of its original soundness. It becomes a part of the statute, as much so as if incorporated into the body of it, and in following the statute as thus interpreted we only apply to a local question, the law of the place."

The illustration we have given above, presents the facts of the present case, and the provisions of the Code of Iowa applicable thereto.

The Code of Iowa gives the right to file a petition for rehearing, and the rule of the Supreme Court requires this to be done within sixty days from the filing of the opinion. In the case at bar, the opinion was filed on the 8th day of November, 1875, and on the 9th, just one day after, *the procedendo* was issued. Within the sixty days, the defendant in error, in the exercise of the right conferred upon him by the statute of Iowa, filed his petition for rehearing in the Supreme Court. The plaintiff in error contended that the Supreme Court could not consider the petition thus filed, because by the issuing of the *procedendo*, that Court had lost jurisdiction of the cause, and the District Court had acquired it, and that it had thence

been removed to the U. S. Circuit Court. This question the Railway Company itself raised before the Supreme Court of Iowa. That Court was thus compelled to construe the provisions of the Code of Iowa, and in doing so, it held that the issuing of the *procedendo* did not deprive that Court of the jurisdiction of the cause, and of the right to hear and determine the petition for rehearing, and that this jurisdiction was a continuing one, and that when the petition for removal was filed, the case was still pending in the Supreme Court.

Thus we have an authoritative construction of the provisions of the Code of Iowa, given by the Supreme Court of that State, which must be accepted by this Court, as the true interpretation of the statute, and by this decision it is settled that during the sixty days allowed for the filing of a petition for rehearing, a cause remains in the Supreme Court, subject to its jurisdiction, even though a *procedendo* may have been issued and filed in the lower Court. The issuing of the *procedendo* and filing same in the lower Court, are done subject to the continuing jurisdistion of the Supreme Court, to entertain and determine a petition for rehearing if filed within the proper time, the right to file which is given by the statute.

The State Court having thus construed the State statute and having settled the question that its jurisdiction had not been affected by the issuing of the *procedendo*, it followed as a necessary consequence that the petition for removal filed in the District Court of Linn County, could not remove the cause that was still pending in the Supreme Court, to the U. S. Court. This point had been settled by repeated decisions of this Court.

Counsel for plaintiff in error practically admit the force of our position, by the statement in their argument that "it is idle to say that because, ordinarily, the State Court has conclusive power to construe a State statute that it

can conclude the Federal Court as to either, when both Federal and State statutes are involved."

They are evidently hard pushed, when driven to the necessity of taking the position, that the Court in ascertaining the true meaning of the State statute, may ignore the interpretation put thereon by the State Supreme Court, because it may also be required to ascertain the meaning of the Federal statute.

The rights of a party may in a given case, depend upon the combined effect of State and Federal statutes, but that does not obviate the rule, that in ascertaining the true meaning of the respective statutes, the construction thereof in the one case by the State, and in the other by the Federal Tribunal, will be accepted as the true interpretation thereof.

Counsel cite the cases of *Butz vs. the City of Muscatine*, 8 *Wall*, 582, and *Insurance Co. vs. Dunn*, 19 *Wall*, 222, in support of their position that this Court will ignore the decision of the State Tribunal, construing the State statute. In the case first named, the question fell under the exception always recognized by this Court, "and that is when it has been called upon to interpret the contracts of States, though they have been made in the forms of law, etc." *Jefferson Bank vs. Skelly*, 1 *Black*, 443.

In the case of *Insurance Company vs. Dunn*, the State Court construed the meaning of the words "final hearing or trial" used in the act of Congress of 1867, and it was this ruling that was reviewed by this Court.

This case does not come under the exception recognized in *Jefferson vs. Skelly*, but is governed by the general rule briefly given in *Leffingwell vs. Warren*, 2 *Black*, 603 that, "The construction given to a statute of a State by the highest judiciary tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text."

Reading the statute of Iowa therefore, as construed by the highest judicial tribunal in the State, we find it enacted that after an opinion has been filed by the Supreme Court in a cause pending before it, either party may file a petition for rehearing within sixty days, and that during the sixty days, the Supreme Court retains jurisdiction of the cause, even though a *procedendo* may have been issued and filed in the lower Court.

This being the law of Iowa, this Court can not hold that there was error in the refusal of the Supreme Court to grant the motion made by the Railway Company, to dismiss the petition for rehearing.

Counsel for plaintiff in error, in discussing this branch of the case, indulge in various speculations as to what possibly might happen, if certain other things were different from what they are now, as for instance, if the time for applying for a rehearing was extended for one year or longer, and counsel seem to be fearful, that if the Railway Company is compelled to pay the judgment rendered against it, the Supreme Court of Iowa will "feel quite easy about its jurisdiction when once acquired." Now so far as the imaginary hardships conjured up by counsel are concerned, it will be time enough to meet them when they arise. What we are dealing with now, is an attempt on the part of the Railway Company, by filing a petition for removal under the act of 1875, in the District Court long after the trial term has passed, and after a final trial has been had therein, to remove the case from the jurisdiction of the Supreme Court. If such an attempt can succeed, it will behove the Supreme Court of Iowa to understand that its jurisdiction of causes pending before it, is liable at any time to be summarily snatched away by some hocus pocus proceedings had in another Court, without having the poor satisfaction of seeing how the transferrence is brought about.

IV.

Counsel for plaintiff in error assume throughout their argument, that all the steps necessary to be taken under the statute of Iowa, to reinvest the District Court with full jurisdiction of the case, had been taken, and that the cause was pending therein for trial. The District Court was not in session when the *procedendo* was issued and filed with the clerk. Section 3206 of the code of Iowa, cited on page 5 of plaintiff's argument, enacts the steps that are to be taken when a *procedendo* is filed during vacation in order to confer jurisdiction on the inferior Court.

The section reads as follows:

"If remanded to the inferior Court to be carried into effect *such decision and the order of the Court* thereon, being certified thereto, *and entered on the records of the Court*, shall have the same force and effect as if made and entered during the session of the Court in that district."

The record shows that the *procedendo* was filed with the clerk. See pages 91 and 92 of record. It is not shown that the decision and order of the Court "were entered on the records of the Court." No order or action of any kind was ever had in the District Court of Linn county. All that was done was to file the *procedendo* with the clerk during vacation, followed by the filing with the clerk of the petition for removal to the U. S. Circuit Court.

The District Court of Linn county never reassumed control or jurisdiction of the cause in any manner, and we submit that under the provisions of the section of the Code of Iowa, cited by plaintiff in error, it is clear that the proper steps were not taken to reinvest that Court with jurisdiction of the cause for any purpose. Filing the *procedendo* with the clerk is not the equivalent of having the decision and order entered on the records of the

Court, and it is the latter act that the statute enacts shall give the lower Court jurisdiction, when the Court is not in session.

Until this was done, the case was not pending in that Court, and unless it was, even counsel for plaintiff in error will not claim that the filing of a petition for removal could in any way defeat the right of the Supreme Court to entertain the petition for rehearing.

V

Counsel for plaintiff in error admit that if McKinlay filed a petition for rehearing, the Supreme Court possessed "the power to recall the case," (see page 9 of argument) but claim that the existence of this power in the Supreme Court, shows that the case was not within the jurisdiction of that Court. Should not the conclusion be just the opposite? If the Supreme Court upon a petition for rehearing being filed, has the power without notice to the other party to the suit, and without any writ or notice being served upon the District Court or any of its officers, to consider the petition for rehearing, does not that fact show that the Court has jurisdiction of the case, and by reason of such jurisdiction, has the right to consider the petition for rehearing.

The radical error in the reasoning of counsel for plaintiff in error on this branch of the case, lies in the assumption that the issuing and filing of the *procedendo* of necessity deprived the Supreme Court of all further jurisdiction of the case, and that the Supreme and District Courts might not both have jurisdiction for certain purposes at the same time.

Take for example, a case pending in the District Court, wherein a hearing is had and decision rendered on some material point, from which decision an appeal is taken to the Supreme Court, but no supersedeas bond is filed. The Supreme Court nevertheless takes jurisdiction of the

appeal and hears and determines the same. Meanwhile the cause is proceeded with in the District Court, just the same as though no appeal had been taken. If the Supreme Court affirms the decision appealed from, the subsequent proceedings in the District Court had during the pendency of the appeal, are not affected. If a reversal is had, then so much of the subsequent proceedings as are inconsistent with the ruling of the Supreme Court are set aside, but will counsel pretend in such a case, that only one Court has jurisdiction of the cause?

In the case at bar the *procedendo* was filed in the District Court on the 15th of December. Suppose on the 16th instant, a petition for rehearing had been filed in the Supreme Court, would not that Court be bound under the statute to consider it? The decision is not necessarily suspended by the filing of the petition for rehearing. Whether the decision shall or shall not be suspended pending the consideration of the petition, depends on the order of the Court or Judge. If such order is not granted, it does not deprive the party of his right to have the case re-examined on his petition, and in the meantime the *procedendo* is still out and the case is pending in the District Court, subject however to the action to be taken by the Supreme Court on the petition.

VI.

The record shows that all that was done by plaintiff in error, was to procure a *procedendo* and have the same marked filed by the clerk of the District Court, during vacation, and then to file a petition for removal, with bond in the District Court. The District Court never was asked to enter any order in the case. The statute provides that Court shall "accept the petition and bond," but in this case, the Railway Company never brought the matter in any way to the attention of the State Court. We submit that upon such a showing it can not be held

that the cause was removed, even if in other particulars the case was one proper for removal under the statute.

According to the theory of plaintiff in error all that was incumbent upon it, was to file with the clerk of the State Court a petition and bond during vacation, and then pay no further attention to that Court. Scant courtesy this. Have litigants in State Courts no rights to be protected?

Suppose a petition for removal is filed, which on its face shows that the party applying for the removal is not entitled thereto. Is the State Court powerless? Can not it refuse the application on the ground that it appears that the petitioner is not entitled to a removal of the cause?

Suppose a petition for removal is filed, and it can be shown beyond all controversy by proof, that the parties are both residents of the same State, or that the cause has been pending for several terms, can not the State Court hear the proofs and upon the facts determine that the petitioner is not entitled to a removal? Such decision would not be final, but has not that Court the right to enquire whether a case for removal exists? So soon as it appears that the application is within the statute, then no discretion exists with the State Courts. It must accept the petition and bond, because it appears that the petitioner has brought himself within the statute, but the State Court certainly can exercise the legal discretion of determining in the first instance, whether the petitioner's case is within the statute

Railway Company vs. Ramsey, 22 *Wall*, 328.

VII.

The record shows that the cause of action in favor of defendant in error arose in March, 1872. Final judgment was rendered by the Supreme Court of Iowa on the 23d day of October, 1876. By the writ of error taken to this Court, and the supersedeas filed therewith, the plaintiff in error has delayed the payment of the judgment for the space of nearly three years.

When the cause was originally brought in the State Court, the Railway Company elected to try the case in that forum. Being defeated in the lower Court, it carried the case to the Supreme Court of the State. The decision of that Court settled the question at issue between the parties. From that time forward, the Railway Company has simply fought for delay. It has used the forms of the law to hinder and delay the payment of a judgment legally adjudged, and it has forced the Defendant in error to submit to this delay, and compelled him to incur the large expense involved in following the case to this Court and protecting his rights before this tribunal. The Railway Company has led the dance and has compelled not only the defendant in error to follow its lead, but has subjected this Court to the labor of investigating a record of many pages, largely made up of wholly irrelevant matter, and thereby added to the burdens already imposed upon the Court, and for what end? What right has been denied to the Railway Company, according to its own showing?

Stripped of all verbiage, the only right claimed by the company was, that in case of a second trial on the original issues, such trial should be had in the U. S. Circuit Court. Was the company forced to go to trial a second time in the State, or any other Court? It was not. Then of what does the Railway Company complain. Simply of the fact that it endeavored to obtain a new trial by an appeal to the Supreme Court of Iowa; that it failed to perfect its right thereto, and that the Court to which the Company itself carried the case, decided against it.

Admitting that under the act of 1875, (which we do not however in fact concede), the Company would have had the right to remove the cause into the Federal Court, for the purposes of a second trial on the facts, it is clear that such removal could not be asked nor denied, until the right to such second trial had been perfected, and it is no

less clear that the Supreme Court of Iowa, the only tribunal that could determine whether such second trial should be had, refused to grant the same. Under such a state of facts, it is evident that the action of the Railway Company in bringing the case before this Court was not based upon any well founded belief, that its rights had been intringed or denied in any particular. It has enjoyed at the expense of the defendant in error, and to the detriment of this Court, and other litigants whose causes have been thereby delayed, the privilege of delaying and defeating the collection of the judgment awarded against it, and now it should be compelled to make good at least a portion of the loss and damage caused thereby. We believe the case is one demanding the enforcement to the uttermost of the rule providing for additional damages for causes appealed for delay merely, and we ask therefore an allowance of the highest amount fixed by the rule.

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